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FEDERAL COMMUNICATIONS COMMISSION

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Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-296

In re Applications of

PALMETTO BROADCASTING, INC. OF MURRELLS INLET (hereafter Palmetto) — File No. BPH-870715MD

INLET BROADCASTING CO. (hereafter Inlet) — File No. BPH-870724MA

OLDE POINT CATV, INC. (hereafter CATV) — File No. BPH-870730MC

MURMAR MEDIA CORPORATION (hereafter MurMar) — File No. BPH-870730ME

GARY S. MORRIS & NANCY C. MORRIS, A GENERAL PARTNERSHIP (hereafter Morris) — File No. BPH-870730MJ

MURRELL'S INLET RADIO LIMITED PARTNERSHIP (hereafter MIRLP) — File No. BPH-870730MN

JERRY W. OAKLEY (hereafter Oakley) — File No. BPH-870730MQ

(Augusta Radio Fellowship Institute d/b/a) SOUTH CAROLINA RADIO FELLOWSHIP (hereafter Fellowship) — File No. BPED-870730MV

RITA A. CAPOBIANCHI (hereafter Capobianchi) — File No. BPH-870730MS (DISMISSED)

For Construction Permit
for a New FM Station
in Murrells Inlet, South Carolina
Channel 233A (94.5 MHz)

HEARING DESIGNATION ORDER

Adopted: June 6, 1988; Released: June 20, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.[1]

2. *CATV*. Section II, Item 4 of FCC Form 301 (October 1986) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. CATV has not completed Item 4 correctly. CATV's application gives a post office box number as the residence address for both Floyd Hufham and Rosemarie Grimsley. Accordingly, CATV must submit an amendment which gives all the information required by Section II, Item 4 to the presiding Administrative Law Judge after this Order is released.

MORRIS

3. Gary S. Morris is Vice-President and General Manager of WYAK AM/FM in Surfside Beach, South Carolina. Mr. Morris has indicated his intent to terminate his relationship with WYAK AM/FM in the event of grant of the referenced application. Accordingly, in the event of grant of the Morris application, Mr. Morris will be required to sever all connections with WYAK AM/FM prior to the commencement of program test authority.

4. Morris proposes to side-mount its antenna on the existing WYAK (AM) tower. Our engineering study indicates that this proposal may significantly exceed the ANSI guidelines for human exposure to radio frequency (RF) radiation as outlined in OST Bulletin No. 65 (October 1985). Consequently, we are concerned that Morris may have failed to comply with the newly revised environmental criteria set forth in the *Report and Order* in GEN Docket No. 79-163, 51 Fed. Reg. 14999 (April 12, 1986). Under the newly revised rules, applicants must determine whether their proposals would have a significant environmental effect under the criteria set out in the newly added 47 C.F.R. § 1.1307. If the application is determined to be subject to environmental processing under the 47 C.F.R. § 1.1307 criteria, the applicant must then submit an Environmental Assessment (EA) containing the information delineated in the newly revised 47 C.F.R. § 1.1311. 47 C.F.R. § 1.1307 states that an EA must be prepared if the proposed operation would cause exposure of workers or the general public to levels of RF radiation exceeding specific standards. Since Morris's proposal may have a significant environmental impact as defined by 47 C.F.R. § 1.1307, it will be required to submit the environmental impact information described in 47 C.F.R. § 1.1311. This study must include the effects of co-located AM Station WYAK. In this regard, if the site is presently fenced in compliance with the guidelines, Morris is required to so state and give the distance from the base of the tower to the fence. Accordingly, Morris will be required to file, within 30 days of the release of this Order, an EA with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is

completed. *See Golden State Broadcasting Corp.*, 71 FCC 2d 229 (1979), *recon. denied sub nom Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980).

MIRLP

5. Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and the applicant have been unsuccessful. Accordingly, since no determination has been received as to whether the antenna proposed by MIRLP would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

LATE - FILED AMENDMENTS

6. MurMar (on April 25, 1988) and Oakley (on October 7, 1987) petitioned for leave to amend their respective applications. The accompanying amendments were filed after October 2, 1987, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

FINANCIAL QUALIFICATIONS

7. Applicants for FM construction permits are required to have the financial ability to construct and operate the proposed station for three months without relying on advertising or other station revenues to meet operating costs. *Financial Qualifications for Aural Broadcast Applicants*, 69 FCC 2d 407 (1978); *Financial Qualifications Standards*, 72 FCC 2d 784 (1979). As part of the "program of random checks of the financial qualifications of applicants for construction permits" announced in the Commission's March 19, 1987 *Public Notice* (Mimeo No. 2418), the Bureau required that all Murrells Inlet applicants furnish documentary proof of their respective financial certifications no later than January 20, 1988. Although CATV, Morris, MIRLP, Oakley and Fellowship responded to the Commission's letter, their proposals are deficient for the reasons detailed in the following paragraphs.

8. *CATV*. CATV proposes to obtain the269,600 required for construction and first quarter operations from243,886 "on deposit in two checking accounts in the name of Floyd Hufham, president, director and 100% shareholder," and from a270,000 commitment from United Carolina Bank. Neither source, according to our analysis, is secure at this time. CATV did not provide a financial statement for Mr. Hufham, and therefore we are unable to determine whether he has sufficient liquid assets to meet both his current liabilities and his commitment to the proposed station. Further, the United Carolina Bank letter, lacking details concerning any required security, the term of the loan, and repayment terms beyond three months, is not sufficiently specific and complete to furnish reasonable assurance of the availability of the loan. *Las Americas Communications, Inc.*, 1 FCC Rcd 786, 788 (1986), citing *Jay Sadow*, 39 FCC 2d 808, 810 (Rev. Bd. 1973).

9. *Morris*. To meet its estimated239,539 cost of construction and first quarter operation, Morris proposes to rely on a250,000 loan from Deane Morris, brother of principal Gary S. Morris. Deane Morris has indicated that the loan "would come from any liquid assets that I have at such time plus I would be glad to mortgage any of my Myrtle Beach holdings to cover any monetary needs up to250,000." Analysis of his balance sheet reveals that Deane Morris has the following liquid assets: 30,000 cash on deposit and9,715 in marketable securities. All other assets, including 355,000 equity in real estate,108,000 in accounts receivable and over 1,000,000 in common stock of closely held companies have not been shown to be liquid. Since his liabilities, i.e., real estate mortgages, have not been segregated to show the current portion, we can only assume that the 180,000 due on these liabilities is payable within one year. In any event, the liquidity of real estate has not been demonstrated. Further, the loan letter lacks necessary terms of length, repayment and security. Accordingly, Morris has not shown any funds available from the source. Moreover, the balance sheet of Gary S. Morris, general partner, reveals that his liquid assets include2500 cash in bank and6,900 in marketable securities. All other assets, including12,000 in accounts receivable, 185,000 in real estate and356,400 in common stock of a closely held company, have not been shown to be liquid. Since his liabilities, i.e., real estate mortgages, have not been segregated to show the current portion, we can only assume that the113,0000 due on these liabilities is payable within one year. In any event, the liquidity of real estate has not been demonstrated. Accordingly, Morris has not shown any funds available from that source, either.[2]

10. *MIRLP*. MIRLP has detailed expenses totalling 222,000 for construction and first quarter operation of its proposed station. We are, however, unable at present to conclude our analysis of its financial obligations since the applicant has failed to assign a dollar amount for the land it indicates it will lease. There is no clear indication in any portion of MIRLP's financial documentation that the expense of this lease has been factored into its financial qualifications. If, as assumed, the lease is for land proposed for MIRLP's transmitting antenna site, the fact of the applicant's site availability certification indicates that it has reached "a meeting of the minds" with the owner of the land "as to the key lease terms upon which the land will be made available." *Alden Communications Corp.*, 102 FCC 2d 518, 519 (1985). Until this matter can be resolved, we are unable to verify that the223,880 available to MIRLP will be sufficient to meet all its predicted expenses.

11. *Oakley*. Oakley has detailed expenses totalling 194,013 for the construction and first quarter operations of his proposed station. To meet these costs, Mr. Oakley proposes to rely on a200,000 loan from Southern National Bank of North Carolina, payable over a five year term with a progressive repayment schedule. The bank's July 22, 1987 letter indicates that the collateral is the "security interest on the real property." Our examination of Oakley's financial data reveals, however, that Mr. Oakley proposes to rent office, tower and transmitter space, with no evidence of ownership of any real estate connected with the station. Therefore, Oakley has not shown any funds available to meet his predicted costs.

12. *Fellowship*. Fellowship filed eleven applications between April 22, 1986 and October 8, 1987 for new construction permits to serve communities in Alabama, Georgia and South Carolina. On December 4, 1987, a post-designation financial issue was specified in MM Docket No. 87-386 against Fellowship to determine if it

was financially qualified to construct five of these stations (Byron, Jessup, Vidalia and Leesburg, Georgia; and Florence, South Carolina). *Warner Robins Christian Academy*, FCC 87M-3159). In response, Fellowship provided documentation that it was relying on a bank loan from The First National Bank of Atlanta "of up to 1,500,000" to meet its predicted expenses of777,500 for construction and first quarter operations of the five stations. The722,500 "cushion," Fellowship noted on page 5 of the *Affidavit of Clarence T. Barinowski* (Exhibit 1 to Fellowship's January 21, 1988 "Motion For Partial Summary Decision), would be utilized "to provide at least three months debit service on the loan funds necessary to build and operate each of these stations." Based on these representations and the lack of opposition to Fellowship's motion, the presiding Administrative Law Judge resolved the financial issue in Fellowship's favor (FCC 88M-454, released February 22, 1988).

13. In its response, dated May 3, 1988, to the Bureau's December 30, 1987 request for documentation in support of its financial certification of its ability to construct and operate the referenced Murrells Inlet station, Fellowship indicates that it is relying on the remaining 722,500 to meet its predicted costs of701,000 for construction and first-quarter operation of its six remaining applications. [3] This would, Fellowship notes, leave a "cushion" of21,500 from the First National Bank of Atlanta's loan. Based upon questions concerning both Fellowship's representations in this matter and upon analysis of its financial documentation, we reject the applicant's conclusions as to its financial qualifications. As the Bureau noted in its December, 1987 request for financial documentation, "the Commission requires that each financial certification be made on the basis of documents already in [the applicant's] possession *at the time each application was filed* " (emphasis added). Fellowship certified on July 29, 1987 that "sufficient net liquid assets are on hand or available from committed sources to construct and operate the requested facilities for three months without additional funds." Since The First National Bank of Atlanta did not commit itself to loan Fellowship1,500,000 until December 18, 1987, a serious question exists concerning Fellowship's candor in its dealings with the Commission. Therefore, an appropriate issue will be specified.

14. Finally, our analysis reveals that Fellowship's late-filed response concerning its financial qualifications fails to take two expenditures into account. First, as Fellowship conceded in the Byron, Georgia proceeding, a certain unspecified amount is required for its "debit service." Second, Fellowship is obligated, pursuant to the grant of the "Joint Request for Approval of Settlement Agreement" in the Byron proceeding to pay Warner Robins Christian Academy30,000 for the dismissal of Academy's application. *Memorandum Opinion and Order* in MM Docket No. 87-386, FCC 88M-717 (released March 14, 1988). At a minimum, Fellowship falls8,500 short of meeting *all* its predicted expenses for the acknowledged eleven proposed stations. Accordingly, a financial issue will also be specified against Fellowship in this proceeding.

15. *Capobianchi*. Despite *de facto* extensions of the time limit to respond, Capobianchi has not provided the required documentation documenting her financial certification.[4] Accordingly, her application will be dismissed for failure to respond to an official request for additional information. *See* 47 C.F.R. § 73.3568(b).

EEO

16. The Commission requires that if there will be five or more fulltime employees, the applicant must complete and file Section VI of FCC Form 301, and supply a statement detailing hiring and promotion policies even through there may be only a few members of minorities residing within the proposed service area. Although Palmetto and CATV have filed such statements, each is deficient. Palmetto has failed to list any clearly-defined minority organization it proposes to utilize to attract minority job applicants. Similarly, CATV has not listed either a minority or a woman's organization to utilize for purposes of attracting job applicants. Accordingly, each will be required to submit amendments of their EEO programs to the presiding Administrative Law Judge within 30 days of the release of this Order.

OTHER MATTERS

17. *Area and Populations*. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

18. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

19. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. If a final environmental impact statement is issued with respect to Morris in which it is concluded that the proposed facility is likely to have an adverse effect on the quality of the environment, to determine whether the proposal is consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.1301-1319.

2. To determine whether there is a reasonable possibility that the tower height and location proposed by MIRLP would constitute a hazard to air navigation.

3. To determine with respect to CATV, Morris, MIRLP, Oakley and Fellowship whether, in light of the evidence adduced concerning the deficiencies set forth above in this Order, the applicants are financially qualified.

4. To determine (a) whether, in light of the evidence adduced pursuant to issue 3, above, Fellowship made misrepresentations to the Commission, was lacking in candor in its dealings with the Commission or attempted to deceive or mislead the Com-

mission and (b) if issue (a), above, is resolved in the affirmative, the effect thereof on Fellowship's basic qualifications to be a Commission licensee.

5. To determine which of the proposals would, on a comparative basis, best serve the public interest.

6. To determine, in the light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

20. IT IS FURTHER ORDERED, That CATV shall submit an amendment which contains the information required by Section II, Item 4 of FCC Form 301, to the presiding Administrative Law Judge within 30 days after the release of this Order.

21. IT IS FURTHER ORDERED, That, in the event of grant of the Morris application, Gary D. Morris will be ordered to sever all connections with Stations WYAK AM/FM (Surfside Beach, South Carolina) prior to the commencement of program test authority.

22. IT IS FURTHER ORDERED, That in accordance with paragraph 4 hereinabove, Morris shall submit the environmental assessment required by 47 C.F.R. § 1.1311 to the presiding Administrative Law Judge within 30 days of the release of this Order, with a copy to the Chief, Audio Services Division.

23. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

24. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by MurMar and Oakley ARE GRANTED and the corresponding amendments ARE ACCEPTED.

25. IT IS FURTHER ORDERED, That the petition to deny filed by Inlet against Morris IS DISMISSED as moot for the reasons discussed in footnote 2 hereinabove.

26. IT IS FURTHER ORDERED, That the application filed by Capobianchi IS DISMISSED, pursuant to 47 C.F.R. § 73.3568(b), for failure to respond to an official request for additional information.

27. IT IS FURTHER ORDERED, That Palmetto and CATV shall submit amendments to their EEO information in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge within 30 days of the release of this Order.

28. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

29. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, not later than **July 12, 1988,** file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

30. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTES

[1] Pursuant to its request filed January 20 and amended February 12, 1988, Coastal Carolina Family Radio, Inc.'s application (File No. BPH-870730MO) was dismissed on March 1, 1988.

[2] Inlet petitioned to deny Morris's application, alleging that "Morris was not --and is not--financiallyqualified." We hold that Inlet's petition is in all respects a petition to specify issues before designation. However, given the staff's analysis hereinabove, Inlet's petition will be dismissed as moot.

[3] Fellowship had previously explained its delay in responding by citing the "extensive commitments"of its counsel and the difficulties in securing materials from a principal injured in a January 18, 1988 plane crash in Augusta, Georgia.

[4] Capobianchi cited the delay in transferring files between her former and current counsel as justification for an extension to February 5, 1988 for the filing of her financial documentation.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-295

In re Applications of

ALLEN COUNTY BROADCASTING LIMITED PARTNERSHIP (hereafter Allen) File No. BPH-870615MC

JOSEPH G. PARSON (hereafter Parson) File No. BPH-870615MG

LARKO COMMUNICATIONS, INC. (herafter Larko) File No. BPH-870615ML

FRANK KOVAS (hereafter Kovas) File No. BPH-870615NC

For Construction Permit
for a New FM Station,
Channel 300A, New Haven, Indiana

HEARING DESIGNATION ORDER

Adopted: June 3, 1988; Released: June 20, 1988

By the Chief, Audio Services Division

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. Attempts to obtain Federal Aviation Administration (FAA) clearance through the Commission's Antenna Survey Branch and the following applicant have been unsuccessful. Accordingly, since no determination has been received as to whether the antenna proposed by the applicant below would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

APPLICANT: Kovas

3. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for consolidated proceeding on the issues specified below.

4. Accordingly, IT IS ORDERED That pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower height and location proposed by the following applicant would constitute a hazard to air navigation: Kovas

2. To determine, which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the foregoing issue which of the applications, if any, should be granted.

5. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

6. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this roceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Branch, Audio Services Division, Mass Media Bureau, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

7. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, not later than **July 12, 1988,** file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

8. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

MIDWEST	File Nos. 52906-CL-P-181-B-86
MOBILEPHONE	52407-CL-P-193-B-86
OF MICHIGAN,	52410-CL-P-207-B-86
INC.	

For construction permits to
establish cellular systems
operating of frequency Block B in
the Domestic Public Cellular
Radio Telecommunications Service
to serve:
Muskegan, Michigan (MSA 181)
Benton Harbor, Michigan (MSA 193)
Jackson, Michigan (MSA 207)

MEMORANDUM OPINION AND ORDER

Adopted: June 3, 1988; Released: June 20, 1988

By the Commission:

1. Midwest Mobilephone of Michigan, Inc. (Midwest) has filed an Application for Review of a decision by the Common Carrier Bureau (Bureau) denying Midwest's petition for reconsideration of the action returning the above-captioned cellular applications as unacceptable for filing. *Midwest Mobilephone of Michigan, Inc.*, 1 FCC Rcd 972 (Com. Car. Bur. 1986) (*Bureau Order*).

BACKGROUND

2. The cover page of each application filed by Midwest incorrectly read "Frequency Block B" (*i.e.*, the wireline block). Twenty days later after the initial filing date, Midwest filed an "erratum" to each application and attempted to correct each cover page to read "Frequency Block A" (*i.e.*, the non-wireline block), claiming there had been a typographical error. The Mobile Services Division (MSD) found the Midwest applications to be defective and unacceptable for filing and that an "erratum" could not cure an otherwise defective application. Midwest filed a petition for reconsideration requesting that the Bureau review the MSD's dismissal of the applications. The request for reconsideration was denied by the *Bureau Order*. Midwest seeks review.

MIDWEST'S CONTENTIONS

3. In its Application for Review, Midwest argues that its applications met the Commission's "letter-perfect" standard. Midwest emphasizes that each of its applications contained a signed certification page specifying that all of the information contained in the applications is true and correct, and, in fact, all of the information contained in the applications themselves was correct, including the designation of the applications for the non-wireline frequencies. Thus, Midwest claims that its applications were unfairly dismissed by a misapplication of the "letter-perfect" standard. Midwest contends that it was the first to call attention to its cover pages and that due to the Commission staff's refusal to merely substitute Midwest's corrected cover page with each application, a great deal of Commission time and energy was spent. Thus, Midwest asserts, it would be disingenuous to base dismissal on the need for administrative efficiency and avoidance of processing delays.

4. Midwest also argues that the Bureau erred in characterizing each Midwest "erratum" notice as a curative amendment. Midwest states that since the Commission considers the certification page to be the first page of the application, the application "proper" does not include the cover page, and a correction of the cover page does not constitute an "amendment" to the application.

DISCUSSION

5. We affirm the Bureau's action in denying Midwest's petition for reconsideration. We established our "letter perfect" standard for cellular applications in the *Cellular Lottery Proceeding, First Order on Reconsideration*, 58 Rad. Reg. 2d (P&F) 677, 696 (1985). There, we said "we will require all future cellular applications to be filed in a 'letter perfect' condition, and failure to conform to this standard will constitute grounds for rejection of the application as unacceptable for filing." Procedural requirements were further developed in our *Further Order on Reconsideration*, 59 Rad. Reg. 2d (P&F) 407, 410 (1985). We required that each application contain a certification stating that the application is complete and contains all of the information required by Form 401 and our cellular application rules. We specified that "[t]he signed certification must appear on the first page of each application . . . the cover of which must include the applicant's name, market name and market number for which it is applying *and frequency block designation* (emphasis added) . . . . Failure to comply with the foregoing will result in the application being returned as unacceptable for filing." These requirements were intended to speed processing and avoid the delay previously encountered with pre-screening applications. *Further Order on Reconsideration, supra*, paras. 7- 8 and n.16. In our *First Order on Reconsideration, supra*, para. 47, we indicated that the necessity to search through each application for relevant information was a major factor in this delay. Accordingly, we established the requirement that all identification information must be on the cover of the application. *See* Section 22.913(b) of the Commission's Rules. The "letter perfect" standard is applicable to certain specified requirements at the original intake stage of cellular application processing. *See Johnstown Cellular Communications*, 1 FCC Rcd 1164 (Com. Car. Bur. 1986). Correct frequency block designation is one of these requirements. Applications that fail to meet the specified intake filing requirements will be dismissed. *See Public Notice*, Rpt. No. CL-86-40, Mimeo No. 1202, rel. Dec. 3, 1985; *see, also, PacTel Mobile Access, Order on Reconsideration*, Mimeo No. 4743 (C.C.B., May 27, 1986), application for review denied, 1 FCC Rcd 564 (1986).

6. Midwest's applications were defective when filed and did not meet our "letter-perfect" standard. As to Midwest's assertion that each "erratum" did not constitute a curative amendment, we disagree. As stated above, the "letter-perfect" standard requires that all identification information must be on the cover page of the application. The cover pages of Midwest's applications did not comply with this requirement. Midwest's attempt to correct each cover page via an "erratum" constituted an attempt to cure a defect in each application. As the Bureau Order at para. 7 correctly stated, a curative amendment attempting to correct deficiencies involving the initial intake of applications is not permitted. See Further Order on Reconsideration, *supra*, at n.17.

CONCLUSION

7. We conclude that the action of the Bureau denying Midwest's petition for reconsideration, as set forth in the Bureau Order, was proper.

ORDERING PARAGRAPH

8. Accordingly, IT IS ORDERED that the application for review filed by Midwest Mobilephone of Michigan, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Walker Feaster III
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-294

In re Applications of

ALFRED A. JOHNSON (hereafter Johnson)	File No. BPH-870505KA
GEORGIA FAMILY RADIO LIMITED PARTNERSHIP (hereafter Family)	File No. BPH-870506KB
CRAWFORD BROADCASTING COMPANY INC. (hereafter Crawford)	File No. BPH-870506KC
CRAWFORD FM LIMITED PARTNERSHIP (hereafter Limited)	File No. BPH-870506KD

For Construction Permit for a New FM Station on Channel 271A in Crawford, Georgia

HEARING DESIGNATION ORDER

Adopted: June 1, 1988; Released: June 20, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Limited.* In its amendment filed July 7, 1987, Limited attempts to certify that no limited partner will be involved in the management or operation of the proposed station. Applicant's statement does not satisfy the certification requirement of Section II, Item 3(a) of FCC Form 301. Accordingly, applicant shall submit the proper certification to the presiding Administrative Law Judge.

3. The applicant below has petitioned for leave to amend its application on the date shown. The accompanying amendment was filed after July 20, 1987, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendment is accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment will be disallowed.

APPLICANT	AMENDMENT FILED
Family	3/22/88

4. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

5. Section II, item 4(a), FCC Form 301 (January 1982) requires an applicant to specify its address (number, street, city, state) as well as the home address of each of its principals. Johnson has not completed item 4(a) correctly. The Johnson application gives a Post Office Box number as the residence address of Alfred A. Johnson. Accordingly, Johnson must submit an amendment which gives all the information required by Section II, item 4(a), FCC Form 301, to the presiding Administrative Law Judge within 30 days after this Order is released.

6. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

7. Accordingly, IT IS ORDERED, that, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in the light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

8. IT IS FURTHER ORDERED, That Limited shall file the Amendment, as specified in paragraph 2 above, with the presiding administrative Law Judge within 30 days of the release of this Order.

9. IT IS FURTHER ORDERED, That the petition for leave to amend filed by the following applicant IS GRANTED, and the corresponding amendment IS ACCEPTED to the extent indicated herein: Family

10. IT IS FURTHER ORDERED, That Johnson shall submit an amendment which contains the information required by Section II, item 4(a), FCC Form 301, to the presiding Administrative Law Judge within 30 days after this Order is released.

11. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

12. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, not later than **July 11, 1988,** file with the Commission, in triplicate,

a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

11. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re applications of

ALDEN COMMUNICATIONS CORP Green Valley, Arizona	**MM DOCKET NO. 83-720** File No. BPCT-830311KF
SUNGILT CORPORATION, INC. Green Valley, Arizona	**MM DOCKET NO. 83-721** File No. BPCT-830311KN

For Construction Permit

MEMORANDUM OPINION AND ORDER

Adopted: June 8, 1988; **Released: June 22, 1988**

By the Commission:

1. Before the Commission are: (a) an Application for Review filed July 20, 1987 by Sungilt Corporation, Inc.; (b) a Conditional Application of Review filed July 20, 1987 by Alden Communications Corp.; (c) an Opposition to Application for Review filed August 18, 1987 by Alden; (d) an Opposition to Application for Review filed August 18, 1987 by Sungilt; (e) a Reply to Opposition to Application for Review filed September 2, 1987 by Sungilt; (f) a Motion to Strike filed September 14, 1987 by Alden; and (g) an Opposition to Motion to Strike filed September 24, 1987 by Sungilt. These pleadings relate to a Decision of the Review Board granting Alden's application for a new television station in Green Valley, Arizona. 2 FCC Rcd 3462 (Rev. Bd. 1987).

I. BACKGROUND

2. Sungilt and Alden are the two remaining applicants for a new UHF television station for Green Valley, Arizona. In an initial decision, Administrative Law Judge John H. Conlin granted Sungilt's application based on its superior integration proposal. *Alden Communications Corp.*, 102 FCC 2d 523 (Admin. L.J. 1985). Alden appealed the decision to the Board, arguing that the ALJ's ruling should be reversed because, among other reasons, Sungilt had not established that it had reasonable assurance of the availability of its proposed transmitter site. 102 FCC 2d 518, 519 (Rev. Bd. 1985). The ALJ had twice denied Alden's attempts to add a site availability issue in light of Sungilt's representations that it had been advised by employees of the Arizona State Land Department (ASLD) that its proposed transmitter site on Samaniego Peak was available for a television tower. 2 FCC Rcd 3462 at 3462 ¶¶ 2, 4 (Rev. Bd. 1987).

3. The Board, however, held that documents received from Arizona officials established that assurance of a commercial lease of State lands could only be provided following formal application and ASLD review. *Id.* at 3462 ¶¶ 2-4. Therefore, the Board reversed the ALJ, finding "the record to be barren of any indication of a negotiated understanding between Sungilt and the land owner, the State of Arizona, as to whether and upon what terms Sungilt may lease its proposed transmitter site". 102 FCC 2d at 521.

4. Thus, on November 7, 1985, the Board remanded the proceeding to the ALJ "[t]o determine whether Sungilt Corporation, Inc. has reasonable assurance of the availability of a transmitter site." 102 FCC 2d at 521. On November 29, 1985, Sungilt's president filed the required papers with the State of Arizona to request a commercial lease. *Id.* at 3462 ¶ 5. Sungilt filed a motion to delay the scheduled hearing until action on its request could be completed. On May 6, 1986, the State of Arizona approved the request and offered to enter into a 10-year lease at1200 per year, which Sungilt accepted. Based on Sungilt's production of the lease, ALJ Edward J. Kuhlmann, succeeding retired ALJ Conlin, granted Sungilt's motion for summary decision on the site availability issue. *Memorandum Opinion and Order Granting Summary Decision in Lieu of Supplemental Initial Decision*, FCC 86M-2161 (July 2, 1986).

5. The Review Board reversed. 2 FCC Rcd 3462 (Rev. Bd. 1987). The Board found that Sungilt was notified by the ASLD in December 1984 that a written application must be filed before it could enter into an agreement to use the State's land. 2 FCC Rcd at 3464 ¶ 15. In view of this fact, the Board held that Sungilt had not shown good cause for its delay in applying to the State of Arizona for site assurance for over a year before receiving a written lease in May 1986. *Id.* at 3464 ¶ 18. Therefore, Sungilt's amendment was untimely and Sungilt was found not qualified to be a licensee because it had not shown on the record that it had reasonable assurance that its proposed transmitter site would be available.

II. ARGUMENT

6. Sungilt argues that it has done all that the applicants did in *Arizona Number One Radio, Inc.*, 103 FCC 2d 550 (Rev. Bd. 1986), review denied, 2 FCC Rcd 44 (1987), appeal pending, No. 87-1060 (D.C. Cir. filed Feb. 5, 1987). In that case, the Board found reasonable assurance of site availability even though some applicants had not filed formal requests with the Bureau of Land Management for use of Federal lands as a transmitter site. The distinction, according to the Board, was that those applicants were unable to obtain final approval because of the BLM's policy of issuing such approval only *after* the FCC's issuance of a construction permit for the proposed station. Here, the Board stated:

> Arizona's policy did *not* require final FCC approval as a condition precedent; on the contrary, Sungilt was notified on December 27, 1984, if not much earlier, that the State would act following formal application and review.

2 FCC Rcd at 3464 ¶ 17 (emphasis in original).

7. However, the distinction relied upon by the Board does not conform with the specifics of Arizona's approval process. The request submitted by Sungilt to the ASLD is

entitled "Application for Commercial Lease on State Land." *See* Sungilt's Motion for Summary Decision, filed June 6, 1986, Attachment A. The cover letter to the lease offered by the ASLD stated:

> You *MUST* execute and *RETURN* all of the lease documents WITHIN SIXTY (60) DAYS from this date or this lease offer will be declared NULL AND VOID and of no force and effect, and the lands may be open and available for application by other persons.

Id., Attachment G (emphasis in original). Thus, short of entering into the offered lease, which Sungilt ultimately did, the assurance of site availability given by the ASLD would have been valid for only two months.

8. The Commission has consistently held that an applicant need not enter into a final or binding agreement in order to demonstrate reasonable assurance of site availability. *Suburban Broadcasting Co.*, 19 RR 956a (1960); *Eastside Broadcasting Co.*, 45 FCC 1202 (Rev. Bd. 1963). To do so would require the applicant to expend substantial sums of money over a period of years before it is ever granted a construction permit.

9. In its remand order, the Board considered Sungilt's argument that a presumptive right arises, under Arizona law, to use all State land for commercial purposes for a term of up to ten years and at a minimum rate of600 per year. 102 FCC 2d at 521. The Board also noted that a member of the ASLD staff had represented that the site requested by Sungilt was available for commercial lease and that a formal application would be accepted and processed. *Id.* at 520. Nonetheless, the Board, pointing to information that ASLD had made no determination to grant anyone a lease on the site, concluded that Sungilt had not demonstrated reasonable assurance of the availability of its proposed transmitter site. *Id.* at 521. The Board relied on *Shoblom Broadcasting Inc.*, 93 FCC 2d 1027 (Rev. Bd. 1983), and *South Florida Broadcasting Co.*, 99 FCC 2d 840 (Rev. Bd. 1984), in concluding that the filing of a request for a lease was a condition precedent to establishing reasonable assurance that Sungilt's site would be available. In our view, neither of those cases requires such a conclusion. In contrast to the Board's holdings in *Shoblom* and *South Florida* -- where the records showed that the applicants' proposals had been explicitly *rejected* -- the present situation merely involved a refusal to determine whether to grant a lease.

10. Where an applicant is dealing with a government agency that is unwilling or unable to make less than a legally binding commitment, and where the record contains no explicit rejection of the applicant's proposal, a mere willingness by the government agency to entertain a request for use of the land in question is sufficient to provide reasonable assurance of the site's availability. Because it had made such a showing, Sungilt, like the applicants in *Arizona One*, had done all in its power to assure the availability of the site, short of entering into a lease. The fact that the ASLD would accept a request for land use, while the BLM would only consider such a request after the grant of a construction permit by the FCC, is a distinction without a difference. In fact, the only greater assurance that the ASLD would give was tied to a request for a formal lease, which the Commission has not previously required in order to demonstrate reasonable assurance of site availability.

11. Thus, not until the Board remanded the case and specified a site availability issue was Sungilt on notice that a formal request for a lease would be required in order to meet the Commission's requirement that the applicant show reasonable assurance of site availability. We are therefore convinced that Sungilt acted expeditiously in obtaining a lease for its transmitter site and that, as the ALJ found, good cause was shown for its request for leave to amend. Having amended its application to show a binding lease for use of ASLD's land, the site availability issue specified by the Board must be resolved in Sungilt's favor.

12. Because the Board determined that Sungilt was unqualified on the site availability issue, the Board did not address Alden's exceptions relating to other aspects of the proceeding, including the standard comparative issue. In view of our determination that Sungilt did have reasonable assurance of site availability, the standard comparative issue and any other matter remaining before the Board must be considered before an affirmative public interest finding resolving this proceeding can be made.

13. We believe that the public interest would be best served by remanding this proceeding to the Review Board so that it may consider these matters in the first instance. The Commission has delegated its authority to the Board to review exceptions to initial decisions. This delegation enables the Commission to devote more time to major matters of policy and planning and to more significant adjudicatory matters. *Horne Industries, Inc.*, 53 RR 2d 1647, 1648 ¶ 3 (1983); *Alexander S. Klein, Jr.*, 67 FCC 2d 894, 895 ¶ 2 (1977). This is an ordinary comparative case, and the Board, having reviewed the Initial Decision, is already familiar with the record. Accordingly, we remand this proceeding to the Board for further consideration in accordance with this order, and for the expeditious preparation of a supplemental decision. If the matter is reappealed to the Commission, we will likewise attempt to complete our review expeditiously.

III. ORDERS

14. ACCORDINGLY, IT IS ORDERED, That pursuant to 47 C.F.R. § 1.115(f), which authorizes replies to oppositions only when requested by the Commission, the Motion to Strike filed by Alden Communications Corp. on September 14, 1987 IS GRANTED and the Reply to Opposition to Application for Review filed September 2, 1987 by Sungilt IS DISMISSED.

15. IT IS FURTHER ORDERED, That pursuant to 47 U.S.C. § 155(c)(5) and 47 C.F.R. § 1.115(g), the Application for Review filed July 20, 1987 by Sungilt Corporation, Inc. IS GRANTED to the extent reflected above and IS DISMISSED in all other respects; and that the Decision of the Review Board, 2 FCC Rcd 3462 (1987), IS MODIFIED as reflected above.

16. IT IS FURTHER ORDERED, That this proceeding IS REMANDED to the Review Board for preparation of a supplemental decision, and that the Conditional Application of Review filed July 20, 1987 by Alden Communications Corp. IS DISMISSED subject to the Board's further consideration of this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-272

In the Matter of

OYATE, INC.

Order to Show Cause Why the License of KQHU-FM Should Not Be Revoked and Notice of Apparent Liability for a Forfeiture

In re Application of

OYATE, INC. File No. BTCH-851205HO
Licensee of Station KQHU-FM
Yankton, South Dakota

For Consent to the Transfer of Control

In re Application of

OYATE, INC. File No. BTCH-851205HP
Licensee of Station KQHU-FM
Yankton, South Dakota

For Consent to the Transfer of Control

In re Application of

OYATE, INC. File No. BAPLH-880115GV
Licensee of Station KQHU-FM
Yankton, South Dakota

For Involuntary Assignment of the License of KQHU-FM to William F. Turner, Trustee in Bankruptcy

In re Application of

WILLIAM F. TURNER, File No. BAPLH-880504HA
Trustee in Bankruptcy
Licensee of Station KQHU-FM
Yankton, South Dakota
(assignor)

and

FLAGSHIP COMMUNICATIONS, INC.
(assignee)

For Consent to the Assignment of License

ORDER

Adopted: June 10, 1988; Released: June 22, 1988

By the Commission:

1. The Commission has before it: (1) an Emergency Motion for Stay filed June 7, 1988 by William F. Turner, Trustee in Bankruptcy, and (2) the Mass Media Bureau's Opposition to Emergency Motion for Stay filed June 8, 1988. Turner, the trustee in bankruptcy of Oyate, Inc., the licensee of station KQHU-FM in Yankton, South Dakota, asks that the Commission stay an evidentiary hearing scheduled to begin June 13, 1988 in Sioux City, Iowa in this revocation proceeding. Turner seeks a stay pending Commission consideration of his petition to terminate this proceeding by assigning the station to a third party under the policy enunciated in *Second Thursday Corp.*, 22 FCC 2d 515, recon. granted, 25 FCC 2d 112 (1970).

2. Our preliminary examination of the proposed *Second Thursday* sale indicates that it presents a close and difficult question. However, we believe that it may be possible to resolve the matter expeditiously, and we do not believe that it would serve the public interest to expend hearing resources while we consider this matter. We therefore stay the hearing.

3. ACCORDINGLY, IT IS ORDERED, That the Emergency Motion for Stay filed June 7, 1988 by William F. Turner, Trustee in Bankruptcy IS GRANTED; and that further proceedings in MM Docket No. 87-272 ARE STAYED until further order of the Commission.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-138

In re Applications of

ELAINE C. EICHER — File No. BPH-850712ZH
Appomattox, Virginia

HOME TOWN BROADCASTING, INC. — File No. BPH-850712ZI
Appomattox, Virginia

MARANATHA BROADCASTING CO., INC. — File No. BPH-850712ZJ
Appomattox, Virginia

JAMES A. POUNDS — File No. BPH-850712O2
Appomattox, Virginia

For Construction Permit

ORDER

Adopted: June 9, 1988; Released: June 22, 1988

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

1. On April 5, 1988, as supplemented May 26, May 31 and June 1, 1988, the parties to this proceeding filed a joint request for approval of a partial settlement which contemplates the withdrawal of Maranatha Broadcasting Company, Inc. (MBC) as an applicant.

2. MBC has agreed to dismiss its application in return for monetary consideration should either Home Town Broadcasting, Inc's. or James A. Pounds' application be granted, or a right of first refusal to acquire the construction permit or station should Elaine C. Eicher prevail. The applicants point out that approval of the proposed agreement will promote the public interest by conserving the resources of the Commission and the parties by reducing the number of parties to the instant proceeding. They have also declared under penalty of perjury that the applications were not filed for the purpose of reaching or carrying out such a settlement agreement. This showing satisfies the requirements of Section 73.3525(a)(1) and (a)(2) of the Commission's Rules, 47 CFR §73.3525(a)(1) and (a)(2), and justifies our approval of the joint request. *See Scott & Davis Enterprises, Inc.*, FCC 83I-129, released November 9, 1983 (agreement approved giving new entity 46% interest and right of first refusal to purchase 51% more).[1]

3. ACCORDINGLY, IT IS ORDERED, That the Joint Request for Approval filed by Maranatha Broadcasting Company, Inc., Elaine C. Eicher, James A. Pounds, and Home Town Broadcasting, Inc. on April 5, 1988 and supplemented May 26, May 31 and June 1, 1988 IS GRANTED; that the settlement agreement IS APPROVED; that the application of Maranatha Broadcasting Co., Inc. (File No. BPH-850712ZJ) IS DISMISSED; and that the petition for leave to amend filed February 23, 1988 by Maranatha Broadcasting Company, Inc. IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

FOOTNOTE

[1] Approval of the provisions relating to MBC's right of first refusal to purchase the construction permit is conditioned on the understanding that any such future transaction would fully comply with 47 CFR §73.3597 and Commission policy. *See generally Central* Television, Inc., 60 RR 1297, 1299 (1986) (subsequent history omitted).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 85-394

In re Applications of

THOMPSON BROADCASTING OF BATTLE CREEK, INC.	File No. BPCT-850461KG
MARGARET MILLER	File No. BPCT-850607KN

For Construction Permit
Battle Creek, Michigan

MEMORANDUM OPINION AND ORDER

Adopted: June 9, 1988; Released: June 22, 1988

By the Review Board: MARINO (Chairman), BLUMENTHAL, ESBENSEN.

1. On June 3, 1988, Thompson Broadcasting of Battle Creek, Inc. (Thompson) and Margaret Miller (Miller), mutually exclusive applicants for a new television station (Channel 43) at Battle Creek, Michigan, filed with the Review Board a "Joint Request for Approval of Agreement." Previously, in an *Initial Decision*, 2 FCC Rcd 5926 (1987), presiding Administrative Law Judge Edward Luton granted the Thompson application. Following the filing of exceptions with the Board, and oral argument held March 11, 1988, the parties sought and were granted extensions of time to complete and submit the necessary settlement documents. We shall grant the joint settlement request, which complies with the requirements set forth in 47 U.S.C. §311(c) and incorporated in 47 CFR §73.3525(a).

2. The settlement agreement provides for the grant of the Miller application and the payment by Miller of$25,000 to Thompson for the voluntary dismissal of the latter's application. The parties have submitted a copy of their settlement agreement and the necessary declarations of each applicant, made under penalty of perjury, stating that the agreement will serve the public interest by hastening the inauguration of a new television station in Battle Creek and by conserving the resources of the parties and the Commission, *see* 47 CFR §73.3525(a)(1), and that neither application was filed for the purpose of securing or carrying out a settlement agreement, *see* 47 CFR §73.3525(a)(2).

3. ACCORDINGLY, IT IS ORDERED, That the "Joint Request for Approval of Agreement," filed on June 3, 1988 by Thompson Broadcasting of Battle Creek, Inc. and Margaret Miller, and the "Petition to Reopen the Record" filed by Margaret Miller on January 11, 1988, containing an FAA "no air hazard" determination dated December 17, 1987, ARE GRANTED,[1] and the settlement agreement IS APPROVED; that the exceptions of the applicants ARE DISMISSED; that the application of Margaret Miller (File No. BPCT-850607KN) for a construction permit for a new television station at Battle Creek, Michigan IS GRANTED; that the application of Thompson Broadcasting of Battle Creek, Inc. (File No. BPCT-850461KG) IS DISMISSED; and that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

FOOTNOTE

[1] In order to address an air hazard issue designated against her, Miller submitted an "Acknowledgement of Notice of Proposed Construction" from the FAA indicating that, whereas Miller's original 977 feet above ground level proposal "would exceed [the FAA's] obstruction standards" and therefore was presumptively an air hazard, a reduction in height to 500 feet or less would result in a proposal that "would not exceed [the] obstruction standards." Miller Exh. 2. In response to that FAA notice, Miller promptly amended her proposal by reducing her antenna tower height to 500 feet. *I. D.*, para. 11. Despite Miller's prompt action, the ALJ resolved the air hazard issue against Miller because the FAA notice did not state *verbatim* that a 500 foot proposal would constitute "no hazard." *Id.*, para. 20. While the ALJ's ruling appears to us to be unduly harsh as a matter of law, *see* Tr. of Oral Arg. at 81-90, 110-113, acceptance of the later FAA notice contained in Miller's petition to reopen the record, filed with the Board, which notice specifically states that the 500 foot amended proposal "would not be a hazard to air navigation," removes any doubt as to Miller's prior FAA clearance. While Miller could have forefended any adverse ALJ ruling by promptly securing the customary FAA "no hazard" determination, and its failure to do so raised unavoidable questions as to the acceptability of its tower site (and height), we will not fatally penalize it here for its sloppy practice. Applicants should be on notice, however, that the failure to timely secure an FAA "no hazard" determination will generally result, at minimum, in the designation of an air hazard issue, even if a remand by the Board is necessary. Lack of diligence will also carry the appropriate risk. *Cf. Shoblom Broadcasting, Inc.*, 93 FCC 2d 1027, 1028-1029 & n.3 and 95 FCC 2d 444, 445-446 (Rev. Bd. 1983)(late acquisition of appropriate government site approval insufficient to offset applicant's lack of diligence and "good cause" in filing site amendment), *aff'd* by judgment subnom. Royce Intern. Broadcasting Co. v. FCC, 762 F.2d 138 (D.C. Cir.), cert. denied, 106 S.Ct. 410 (1985).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-289

In re Applications of

JOSE A. ORTIZ LOZADA	File No. BPCT-861117KS
Aurio Matos, Jr. d/b/a THE CHILDREN TELEVISION MEDIA	File No. BPCT-870211KE
HECTOR NEGRONI CARTAGENA	File No. BPCT-870212KK
Fredrick Grimm d/b/a MOUNTLAKE PRODUCTIONS, LTD.	File No. BPCT-870212KY

For Construction Permit
Arecibo, Puerto Rico

HEARING DESIGNATION ORDER

Adopted: May 31, 1988; Released: June 22, 1988

By the Chief, Video Services Division:

1. The Commission, by the Chief, Video Services Division, acting pursuant to delegated authority, has before it the above-captioned mutually exclusive applications of Jose A. Ortiz Lozada (Lozada), Aurio Matos Jr., d/b/a The Children Television Media (Matos), Hector Negroni Cartagena (Cartagena), and Fredrick Grimm d/b/a Mountlake Productions Ltd. (Grimm) for authority to construct a new commercial television broadcast station on Channel 60, Arecibo, Puerto Rico; a petition to deny filed by Cartagena against Lozada;[1] a petition to deny filed by Ebenezer Broadcasting Group, Inc. (Ebenezer), an applicant for Channel 46 in Guayama, Puerto Rico, against Grimm; and an informal objection filed by the Association of Maximum Service Telecasters, Inc. (AMST) against each of the above applicants.

2. AMST filed an informal objection against each of the applicants on the grounds that each applicant proposed a site which would be short spaced to Channel 46, allocated to Guayama, Puerto Rico. Ebenezer, an applicant for Channel 46 in Guayama, also filed a petition to deny the applications of Lozada, Matos, and Grimm on the same ground as the AMST objection.[2] Additionally, Lozada is 31 km (out of a required 31.4 km) from the reference point for Channel 64, Naranjito, Puerto Rico, producing a short spacing of 0.4 kilometers. Subsequently to the filing of the AMST objection and the petition to deny by Ebenezor, both Cartagena and Matos amended their respective application to eliminate the short spacing.[3] With respect to the remaining applications, an appropriate issue will be specified to determine whether circumstances exist warranting a waiver of Section 73.610 of the Commission Rules.[4] In reaching a decision with respect to the short-spacing issue, the presiding Administrative Law Judge shall consider the fact that other applicants in this proceeding have found fully spaced sites.

3. Section II, Item 5 of FCC of FCC Form 301 (April 1985) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. Matos application has not completed Item 5 correctly. Matos application gives a post office box number as the residence address for Aurio Matos, Jr. Accordingly, Matos must submit an amendment which gives all the information required by Section II, Item 5 to the presiding Administrative Law Judge within 30 days after this Order is released.

4. No determination has been reached that the tower height and location proposed by Cartagena, Matos and Grimm each would not constitute a hazard to air navigation.[5] Accordingly, an issue regarding this matter will be specified.

5. The coverage areas proposed to be served by the applicants differ significantly. Consequently, the areas and populations which would be within each predicted 64 dBu (Grade B) contour, together with the availability of other television service of Grade B or greater intensity, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

6. Cartagena proposes a site that is 2.91 km from AM station WCHQ, Camuy, Puerto Rico. In addition, Matos proposed site is 1.10 km from AM station WCHQ, Camuy, Puerto Rico. Accordingly, a grant of a construction permit to either of the applicants will be conditioned to ensure that Station WCHQ's radiation pattern will not be adversely affected.

7. The technical data which Lozada has provided in response to Section V-C, item 15, are incorrect. The indicated contour distances are substantially greater than the distances that would result from calculations made in accordance with Section 73.684 of the Commission's Rules. Therefore, Lozada will need to review his contour calculations and submit the corrected results along with supporting documents to show that the calculations were made in accordance with Section 73.684 of the Commission's Rules, to the presiding Administrative Law Judge within 30 days after this Order is released.[6]

8. From our review of the proposal submitted by Grimm we can not determine whether he is in compliance with the environmental rules set forth in the Report and Order in General Docket No. 79-163, 51 Fed. Reg. 14999 (1986). Under the rules, applicants must determine whether the radiation hazard of their proposals would have a significant environmental effect under the criteria set out in Section 1.1307 of the Commission's Rules. If the applicants are subject to environmental processing under the Section 1.1307 criteria, the applicants must then submit an environmental assessment (EA) containing the information delineated in Section 1.1311 of the Commission Rules. Section 1.1307(b) states that an EA must be prepared if the proposed operation would cause exposure of workers or the general public to levels of radio frequency radiation exceeding specific standards. An examination of the application of Grimm suggests that the applicant has not

followed the procedures outlined above. While it is unlikely that an RF problem exist as a result of the heights and powers proposed by the applicant, other factors must be evaluated by the applicant in making a final determination. The applicant will be required to file, within 30 days of the release of this Order, a statement or showing with respect to radiation hazards that might have an adverse effect on the quality of the environment with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Television Branch, Mass Media Bureau, who will then proceed regarding this matter in accordance with the provisions of Section 1.1308. A copy of the statement must also be filed with the Chief, Hearing Branch, Mass Media Bureau. Accordingly, a contingent environmental issue will be specified, and the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting*, 71 FCC 2d 229 (1979), *recon. denied sub nom. Old Pueblo Broadcasting Corp.*,83 FCC 2d 337 (1980).

9. An applicant who proposes to employ five or more full-time station employees must establish a program designed to assure equal employment opportunity for women and minority groups. This program must be submitted to the Commission. Although Lozada states that he will employ more than five full-time persons, he has not included a copy of his equal employment opportunity (EEO) program. Accordingly, Lozada will be required to submit a copy of his EEO program to the presiding Administrative Law Judge within 30 days after this Order is released.

10. Aurio Matos, Jr., sole proprietor of the proposed television station, is currently employed as general manager of Station WRFE(FM), Aguada, Puerto Rico. Aguada is within Matos' predicted Grade A contour. The present employment of Matos may be inconsistent with the Commission's cross-interest policy. However, Mr. Matos has represented to the Commission that, in the event that he is the successful applicant, he would terminate his employment at the above station and sever all connection therewith. Accordingly, any grant of a construction permit to Matos will be conditioned upon his severance of all connection with Station WRFE(FM).

11. Section IV, FCC Form 301, requires an applicant for a television station to submit, as an exhibit, a brief description, in narrative form, of its planned programming service relating to the issues of public concern facing the proposed service area. None of the applicants, except Cartagena, have submitted such an exhibit. Accordingly, each applicant must submit an amendment which contains the requisite exhibit to the presiding Administrative Law Judge within 30 days after this Order is released.

12. Except as indicated by the issues specified below, the applicants are qualified to construct and operate as proposed. Since the applications are mutually exclusive, the Commission is unable to make the statutory finding that their grant would serve the public interest, convenience, and necessity. Therefore, the applications must be designated for hearing in a consolidated proceeding on the issues specified below.

13. Accordingly, IT IS ORDERED, That pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, to be held before an Administrative Law Judge at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine with respect to the the applications of Jose A. Ortiz Lozada and Fredrick Grimm, whether the proposals are consistent with Section 73.610 of the Commission's Rules and, if not, whether circumstances exist which would warrant a waiver of the rule.

2. To determine, with respect to Aurio Matos, Jr., Hector Negroni Cartagena, and Fredrick Grimm d/b/a Mountlake Productions, Ltd., whether there is a reasonable possibility that the tower height and location proposed by each would constitute a hazard to air navigation.

3. If a final environmental impact statement is issued with respect to Fredrick Grimm d/b/a Mountlake Productions, Ltd. which concludes that the proposed facilities are likely to have an adverse effect on the quality of the environment, to determine whether the proposal is consistent with the National Environmental Policy Act as implemented by Sections 1.1301-1.1319 of the Commission's Rules.

4. To determine which of the proposals would, on comparative basis, best serve the public interest.

5. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

14. IT IS FURTHER ORDERED, That the petitions to deny filed by Hector Negroni Cartagena against Jose A. Ortiz Lozada and Fredrick Grimm d/b/a Mountlake Productions, Ltd. ARE DISMISSED.

15. IT IS FURTHER ORDERED, That the informal objection filed by the Association of Maximum Service Telecasters, Inc. and the petition to deny filed by Ebenezer Broadcasting Group, Inc. with respect to Aurio Matos, Jr., ARE DISMISSED as moot.

16. IT IS FURTHER ORDERED, That the petition to deny filed by Ebenezer Broadcasting Group, Inc., with respect to the applications filed by Jose A. Lozada and Fredrick Grimm IS DISMISSED, and when considered as an informal objection IS GRANTED to the extent indicated herein and is DENIED in all other respects.

17. IT IS FURTHER ORDERED, That Matos shall submit an amendment which contains the information required by Section II, Item 5 of FCC Form 301, to the presiding Administrative Law Judge within 30 days after release of this Order.

18. IT IS FURTHER ORDERED That the Association of Maximum Service Telecasters, Inc. and Ebenezer Broadcasting Group, Inc. ARE MADE PARTIES RESPONDENT with respect to issue 1.

19. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY RESPONDENT to this proceeding with respect to issue 2.

20. IT IS FURTHER ORDERED That, in the event of a grant of the application of Hector Negroni Cartagena or Aurio Matos, Jr., the construction permit will be conditioned as follows.

Prior to construction of the tower authorized herein, permittee shall notify AM Station WCHQ, Camuy, Puerto Rico, so that, if necessary, the AM station may determine operating power by the indirect method and request temporary authority from the Commission in Washington, D.C. to operate with parameters at variance in order to maintain monitoring point field strengths within authorized limits. Permittee shall be responsible for the installation and continued maintenance of detuning apparatus necessary to prevent adverse effects upon the radiation pattern of the AM station. Both prior to construction of the tower and subsequent to the installation of all appurtenances thereon, a partial proof of performance, as defined by Section 73.154(a) of the Commission's Rules, shall be conducted to establish that the AM array has not been adversely affected and, prior to or simultaneous with the filing of the application for license to cover this permit, the results submitted to the Commission.

21. IT IS FURTHER ORDERED, That Jose A. Ortiz Lozada shall review his contour calculations and submit the corrected results along with supporting documents to show that the calculations were made in accordance with Section 73.684 of the Commission's Rules, to the presiding Administrative Law Judge within 30 days after this Order is released.

22. IT IS FURTHER ORDERED, That Fredrick Grimm d/b/a Mountlake Productions, Ltd. shall submit an environmental assessment to the presiding Administrative Law Judge within 30 days of the release of this Order. In addition, a copy shall be filed with the Chief, Television Branch, Mass Media Bureau and with the Chief, Hearing Branch, Mass Media Bureau.

23. IT IS FURTHER ORDERED, That Jose A. Ortiz Lozada shall submit a copy of his EEO program to the presiding Administrative Law Judge within 30 days after this Order is released.

24. IT IS FURTHER ORDERED, That in the event of a grant of Aurio Matos, Jr.'s application, the construction permit shall contain the following condition.

Prior to the commencement of operation of the television station authorized herein, Aurio Matos, Jr. shall certify to the Commission that he has severed all connection with the licensee of Station WRFE(FM), Aguada, Puerto Rico.

25. IT IS FURTHER ORDERED, That each of the applicants, except Cartagena shall submit an amendment which contains the exhibit required by Section IV, FCC Form 301, to the presiding Administrative Law Judge within 30 days after this Order is released.

26. IT IS FURTHER ORDERED, That to avail themselves of the opportunity to be heard, the applicants and the parties respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this Order. Each applicant shall attach to its notice of appearance a remittance of6,000 as a hearing fee as required by Section 1.1104 of the Commission's Rules.

27. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart, Chief
Video Services Division
Mass Media Bureau

FOOTNOTES

[1] On February 12, 1987, Cartagena, an applicant in this proceeding filed a petition to deny Lozada's application, and on July 29, 1987, he filed a petition to deny Grimm's application. The petitions in essence, request dismissal of both applications because the proposals are inconsistent with the spacing requirements of the Commission's Rules. Rather than dismiss the applications as requested, we have specified appropriate issues consistent with our policy with respect to short-spaced mutually exclusive television applications. *See North Texas Media, Inc v. FCC* 59 RR 2d 605 (1985).

[2] Ebenezer is not a party to this proceeding. As a mere applicant for Channel 46 in Guayama, Ebenezer lacks standing in this proceeding. *See Cuero) Broadcasters, Inc.*, 22 FCC 2d 441 (1970). It's petition to deny will be dismissed and considered as an informal objection.

[3] On April 7, 1987, Cartagena filed an amendment changing his antenna site to a location which meets the Commission's minimum separation requirements. Thereafter, AMST withdrew its objection with respect to Cartagena. The last day for amending the above applications as of right was July 29, 1987. On August 5, 1987 however, Matos filed a petition for leave to amend, changing his antenna site to a location which meets the Commission's minimum separation requirements. We have reviewed the amendment and determined that good cause exists for accepting it. Therefore, the informal objection filed by AMST and the petition to deny filed by Ebenezer will be dismissed as moot with respect to Matos. However, no comparative advantage will accrue to Matos because of our action herein.

[4] Lozada's proposed site is 64 km (out of a required 95.7 km) from Guayama, producing a short-spacing of 31.7 km; and Grimm's proposed site is 73.3 km (out of a required 95.7 km), producing a 22.4 km short-spacing.

[5] There is no indication that any of the applicants, except Lozada, has notified the FAA of the proposed construction. If they have not already done so, Cartagena, Matos, and Grimm must each notify the FAA immediately.

[6] The applicant should note that the corrections in item 15, Section V-C, will also require adjustments in the maps required by Section V-C, item 10(b) and the area and population figures required by Section V-C, item 10(e).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-279

In re Applications of

LAQUETH FLEMING and GLORIA FLEMING (hereafter Fleming)	File No. BPH-870327MI
DAVID RINEHART (hereafter Rinehart)	File No. BPH-870331MG
C & D COMMUNICATIONS (hereafter C&D)	File No. BPH-870331NY
POUGHKEEPSIE BROADCASTING LIMITED (hereafter PBL)	File No. BPH-870331OR
OCEAN WAVES BROADCASTING (hereafter Ocean)	File No. BPH-870331PA
HARVEST BROADCASTING (hereafter Harvest)	File No. BPH-870331PP
WICRAE EQUITIES LIMITED (hereafter Wicrae)	File No. BPH-870414KH
POUGHKEEPSIE COMMUNICATIONS LIMITED PARTNERSHIP (hereafter PCLP)	File No. BPH-870415KT
HAL COMMUNICATIONS (hereafter HAL)	File No. BPH-870415KX
THE KINNEY GROUP (hereafter Group)	File No. BPH-870415ME
FARR BROADCASTING, INC. (hereafter Farr)	File No. BPH-870415MJ

For a Construction Permit for
a New FM Station on Channel 241A
in Poughkeepsie, New York

ERRATUM

Released: June 22, 1988

The Hearing Designation Order in MM Docket No. 88-279, DA 88-823 (released June 14, 1988), for Channel 241A in Poughkeepsie, New York, contains an error in Paragraph 2 and Issue 1(a). These sections of the order are hereby amended to read as follows:

2. Reporting. Pursuant to 47 C.F.R. §§ 73.3514 and 1.65, applicants are responsible filing and maintaining accurate and complete information furnished in a pending application or in Commission proceedings involving a pending application. Staff review of Commission records reveals that Harvest failed to comply with these rules. First, in response to FCC Form 301, Section II, Item 6(a), Harvest failed to report the attributable interest of its sole principal Brian Dodge in a pending application for new FM service to Haverhill, New Hampshire (BPH-870327KG), which was filed three days before the instant application. Furthermore, Harvest failed to amend its response to Form 301, Section II, Item 6(a) to report Dodge's subsequent acquisition of attributable interests in pending applications for new AM service to: Center Rutland, Vermont (BP-871130AF); Berlin, Vermont (BP-871130AG); Hallowell, Maine (BP-871130AH); and Suncook, New Hampshire (BP-871130AJ). Additionally, Harvest failed to timely disclose Dodge's attributable interest in an application for new FM service to Winchester, New Hampshire (BPH-880126NN). Therefore, Harvest will be ordered to file an amendment within 30 days with the presiding Administrative Law Judge updating its application with respect to all broadcast interests. Additionally, an appropriate reporting issue will be specified regarding whether Harvest failed to comply with 47 C.F.R. §§ 73.3514 and 1.65 with respect to the broadcast interests of its principal and timely report such interests to the Commission.

1. (a) To determine the facts and circumstances surrounding Harvest's failure to report its pending and subsequently filed applications and whether by such failure Harvest violated 47 C.F.R. §§ 73.3514 and 1.65.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 85-93

In the Matter of

Investigation of Equal Access
Rate Elements Filed Pursuant
to Waivers of Part 69

ORDER TO SHOW CAUSE

Adopted: June 15, 1988; Released: June 22, 1988

By the Chief, Common Carrier Bureau:

1. On November 25, 1987, the Common Carrier Bureau released an Order[1] directing the Bell Atlantic Telephone Companies (Bell Atlantic) and Southwestern Bell Telephone Company (Southwestern) to refund to their interexchange carrier customers revenues collected through Equal Access Recovery Charge (EARC) rate elements during the April 1985 through September 1985 time period.[2] On December 28, 1987, Bell Atlantic filed a petition for reconsideration and a request for stay of the Bureau's *Refund Order*. [3] The Bureau denied Bell Atlantic's request for stay;[4] Bell Atlantic's petition for reconsideration is pending.[5]

2. In a letter to the Commission dated January 27, 1988, Bell Atlantic acknowledges that the Bureau derived the refund amount (approximately6.2 million) from data provided in Bell Atlantic's direct case.[6] Bell Atlantic, however, now claims that the data in its direct case represent equal access revenues derived from two sources: the EARC rate element, and that portion of Local Switching 2 revenues associated with equal access costs. Bell Atlantic states that since the *Refund Order* limits refunds to only those revenues collected via the EARC rate element, Bell Atlantic plans to refund *only* the EARC revenues amounting to approximately 4.3 million. Bell Atlantic Letter at 1.[7] Bell Atlantic's letter does not seek any confirmation or approval by the Bureau regarding Bell Atlantic's theory of the scope of its refund liability.

3. We conclude that this Bureau properly relied on the data in Bell Atlantic's direct case in calculating the revenues collected via the EARC rate element. Bell Atlantic presented its data simply as "equal access revenues." *See* Bell Atlantic Direct Case, Attachments 1 and 2. Bell Atlantic did not specify that the data were derived from a source other than the EARC rate element. As such, Bell Atlantic's January 27, 1988, letter is merely a *post hoc* explanation for the numbers in its direct case. Moreover, pursuant to the *Refund Order*, Bell Atlantic is obligated to refund6.2 million to its customers. Bell Atlantic, however, simply advised the Bureau by letter that it planned to refund only4.3 million, in the form of credits to customer bills. Bell Atlantic Letter at 1.[8]

4. Accordingly, IT IS ORDERED, pursuant to the authority of Sections 4(i), 205(a), and 403 of the Communications Act, 47 U.S.C. §§ 154(i), 205(a), and 403, and Sections 0.291 and 1.701 of the Commission's Rules, 47 C.F.R. §§ 0.291, 1.701, that the Bell Atlantic Telephone Companies are hereby directed to SHOW CAUSE why they should not be required to refund to customers the full amount specified in the *Refund Order*, *i.e.*,6.2 million.

5. IT IS FURTHER ORDERED that answers must be filed as provided in Section 1.701(b) of the Commission's Rules, 47 C.F.R. § 1.701 (b), within ten working days of the date of release of this Order.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] Investigation of Equal Access Rate Elements Filed Pursuant to Waivers of Part 69, CC Docket No. 85-93, Memorandum Opinion and Order, 2 FCC Rcd 7029 (1987) (*Refund Order*).

[2] These amounts were earned in excess of the local exchange carriers' authorized rate of return. *Refund Order*, 2 FCC Rcd at 7029.

[3] Bell Atlantic Petition for Reconsideration, filed Dec. 28, 1987; Bell Atlantic Request for Stay, filed Dec. 28, 1987.

[4] Investigation of Equal Access Rate Elements Filed Pursuant to Waivers of Part 69, CC Docket No. 85-93, Memorandum Opinion and Order, released Jan. 13, 1988.

[5] In its petition for reconsideration, Bell Atlantic generally argues that the Bureau incorrectly found that Bell Atlantic obtained excess earnings from its equal access rate elements. Bell Atlantic Petition for Reconsideration at 1. Bell Atlantic does not request reconsideration of the amount it must refund.

[6] Bell Atlantic filed its direct case on December 19, 1986.

[7] Bell Atlantic states that its letter was intended to clarify an earlier letter to the Commission, dated January 11, 1988. In the January 11 letter, Bell Atlantic noted that it had completed its study of the billing records in affected companies and was moving forward with the ordered refund. Bell Atlantic did not mention any problems with the source of the data either in its direct case, in its January 11, 1988, letter, or in its petition for reconsideration.

[8] If Bell Atlantic believed that the Bureau mistakenly relied on Bell Atlantic's own numbers in its direct case, Bell Atlantic should have filed a petition for reconsideration of this aspect of the *Refund Order*. *See* Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106. We note, however, that since the filing of a formal pleading would not have provided a basis for noncompliance with the *Refund Order*, *a* fortiori, the filing of an informal letter certainly fails to provide a basis for noncompliance. *See* Section 1.102(b) of the Commission's Rules, 47 C.F.R. § 1.102(b).

Before the
Federal Communications Commission
Washington, D.C. 20554

(CORRECTED)

MM Docket No. 85-293

In re Applications of

Minnie O. Foulk and Renee Ridley Biselli, d/b/a WASHOE SHOSHONE BROADCASTING, A Limited Partnership	File No. BPCT-850328KE
RENO-ELEVEN TELECASTERS	File No. BPCT-850509KH
RENO MINORITY BROADCASTING CORPORATION	File No. BPCT-850509KJ
PAGE ENTERPRISES INC. (KAME-TV)	File No. BMPCT-850509KQ
RENO COMMUNITY BROADCASTING CO. A Nevada Limited Partnership	File No. BPCT-850509KS
NEVADA TELEVISION CORPORATION	File No. BPCT-850509KU

For Construction Permit for a New VHF Television Station at Reno, Nevada

Appearances

Edward R. Kump, on behalf of Washoe Shoshone Broadcasting, a Limited Partnership; *Jerome S. Boros, Heidi P. Sanchez*, and *Jerome S. Silber*, on behalf of Reno-Eleven Telecasters; *Paul A. Zevnik* and *Michel Y. Horton*, on behalf of Reno Minority Broadcasting Corporation; *Edward S. O' Neill* and *Chase C. Libbey*, on behalf of Page Enterprises, Inc. (KAME-TV); *Peter A. Casciato*, on behalf of Reno Community Broadcasting Co., a Nevada Limited Partnership; *R. Clark Wadlow, Craig J. Blakeley, Tom Davidson, Margaret L. Tobey*, and *Mark D. Schneider*, on behalf of Nevada Television Corporation; and *Charles Dziedzic* and *Y. Paulette Laden*, on behalf of the Chief, Mass Media Bureau.

DECISION

Adopted: May 12, 1988; Released: June 20, 1988

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN. Chairman MARINO concurring with statement.

Board Member ESBENSEN:

1. This proceeding now involves the six remaining mutually exclusive applications of Washoe Shoshone Broadcasting (Washoe), Reno-Eleven Telecasters (RET), Reno Minority Broadcasting Corporation (RMBC), Page Enterprises, Inc. (Page), Reno Community Broadcasting Company (RCBC), and Nevada Television Corporation (NTC) for a construction permit for a new VHF television broadcast station on Channel 11 at Reno, Nevada. The applications were designated for hearing by *Hearing Designation Order*, FCC 85-293, released October 10,1985 (HDO). The remaining issues in this proceeding are as follows:

a. To determine whether Washoe Shoshone Broadcasting is financially qualified to construct and operate its proposed station; and,

b. To determine whether Washoe Shoshone Broadcasting misrepresented or exhibited lack of candor to the Commission in certifying that it is financially qualified to construct and operate its proposed station; and if so, the effect of such misrepresentation or lack of candor on its qualifications to be a Commission licensee; and,

c. To determine which of the proposals would, on a comparative basis, best serve the public interest; and,

d. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

2. Before the Board are the *Initial Decision* issued by Administrative Law Judge Joseph Chachkin (ALJ), 2 FCC Rcd 5362 (1987) (I.D.), the exceptions thereto filed by all remaining applicants, and reply exceptions filed by all parties (except Washoe and Page) as well as the Commission's Mass Media Bureau. We have reviewed the I.D. in light of the pleadings, the oral argument heard March 25, 1988, and our independent examination of the record. We adopt the findings of fact and conclusions of law of the ALJ, except as modified herein, and affirm the ALJ's grant of NTC's application.

I. COMPARATIVE COVERAGE

3. This proceeding had its genesis some five years ago as a result of the Commission's action proposing to add VHF Television Channel 11 at Reno, Nevada (*Notice of Proposed Rule Making*, 48 Fed. Reg. 18844, published April 26, 1983). In response to this *Notice*, *supra*, Sarkes Tarzian, Inc. (STI), licensee of KTVN(TV), Channel 2, Reno, Nevada, filed a counterproposal, seeking to have Channel 11 assigned instead to Redding, California. However, in issuing its final *Report and Order*, 56 RR 2d 1579 (1984),

the Commission opted for adding Channel 11 at Reno as proposed and specifically declared (at 1582; emphases added):

> Pursuant to the Commission's priorities for assigning television channels, as set forth in its *Sixth Report and Order [Sixth Report and Order on Television Allocations*, 41 FCC 148 (1952)] *supra*, at 167, provision of at least one television service to all parts of the United States is of the highest priority. Denton's reply comments contain a showing that a Channel 11 transmitter at Reno would provide such service. *Specifically, Denton indicates that a Reno station could provide a first commercial television service to 19,265 people within a 2,960 square mile area as well as a second service to 19,865 people within a 2,816 square mile area*, whereas a Redding station could provide no first service and a second service to 11,509 people within a 1,805 square mile area. *An examination of Denton's study by the Commission's staff supports these contentions.*

4. STI filed a Petition for Reconsideration of the *Report and Order, supra*. In response thereto, the Commission issued a *Memorandum Opinion and Order* (MM-1883, released January 10, 1986) (*MO & O),* which denied STI's Petition and discussed pertinent allegations raised by STI. STI had argued that the *Report and Order, supra,* "relied exclusively" on data contained in Denton's reply comments in finding that Reno should be preferred (based on Denton's claims that a station operating on Channel 11 at Reno from *Peavine Peak* would provide first commercial TV service to 19,265 people and a second such service to 19,865 in the Susanville, California area.) STI also argued that because the Bureau relied on Denton's service claims it should have evaluated and not ignored STI's engineering data contained in its response to reply comments. Further, STI claimed that since the decision favoring Reno rested solely on a finding of first and second service to the Susanville area, and since use of the only possible site at Peavine Peak would result in alleged shadowing problems, the Bureau's reliance on this assignment priority set forth in the *Sixth Report and Order, supra,* was misplaced. STI contended that if the Reno assignment stood, the Bureau ought to condition the assignment on, or require use of, an alternate Reno site from which actual service to the Susanville area could be provided, accounting for terrain obstacles.

5. In upholding the assignment of Channel 11 at Reno, the Commission clearly considered all of STI's arguments and opposing engineering data. Nevertheless, it specifically held (*MO & O, supra*, at para. 7; emphases added):

> Initially, the Commission notes that the engineering statement accompanying STI's petition contains a claim that, according to standard Commission prediction methodology, a Redding station transmitting from Bunchgrass Mountain will provide first and second service to 12,198 and 9,156 people, respectively. *Significantly, STI does not challenge Denton's conclusion that 19,265 and 19,865 people, respectively, could receive first and second service from Peavine Peak according to that same standard methodology*. Thus, the Channel 11 proposal for Reno would provide more first and second video service to the area *around* Susanville than would a Redding assignment. Further, an examination by the Commission staff of licensee applications [then] on file reveals that any of eight proposed facilities situated at Peavine Peak could provide service to the unserved and underserved areas near Susanville. Thus, as set forth in the *Report and Order*, based on the comparative predicted first and second services, Reno was properly preferred over Redding for the Channel 11 assignment. Since the assignment was predicated on such service, *the Commission anticipates that the decision of the Administrative Law Judge in comparing mutually exclusive applications for Channel 11 at Reno will take that factor into account*. [Footnotes omitted.]

6. Additionally, the Commission observed (*MO & O, supra*, at n. 5):

> In its referenced engineering statement, STI questions whether, in fact, either Bunchgrass Mountain near Redding or Peavine Peak is a suitable site from which to provide first or second service to Susanville area. In this regard, STI relies on terrain profile studies. According to STI, although the Commission has temporarily suspended use of terrain roughness factors, that suspension was the result of anomalous results occuring under certain terrain conditions, the terrain factors here do not produce such anomalous results, and their use here will produce accurate coverage predictions. However, the Commission's *Order* extending previous action staying the use of terrain roughness factors is applicable to all atypical terrain configurations, "even in those limited number of cases where terrain anomalies are encountered." *Effects of Terrain on Signal Propogation, Evaluation; Temporary Suspension of Certain Portions of Sections*, 42 Fed. Reg. 25736, published May 19, 1977.

7. STI elected to pursue the matter further and filed an Application for Review of the *MO & O, supra*, denying reconsideration of the assignment of Channel 11 at Reno and STI's counterproposal to add that channel at Redding, California. By a second *Memorandum Opinion and Order*, FCC 86-306, released July 7, 1986 (some 14 months after the instant applications were filed), the Commission denied STI's Application for Review of its first *MO & O*.

8. In the instant proceeding, pursuant to the "comparative coverage" aspect of the standard comparative issue, all the parties participated in, and collectively sponsored, a Joint Engineering Exhibit which predicted the following areas and populations to be served by their respective proposals: The Grade B contour of NTC's proposed station would serve a total area of 18,754 miles, with a population of 398,235. RET's Grade B contour would cover a total area of 18,595 square miles with a total population of 395,003. Washoe's Grade B contour would cover a total area of 17,560 square miles with a total population of 394,060. The Grade B contours of the proposed stations of RCBC, Page, and RMBC would cover a total area of 18,588 square miles with a population of 411,649 (I.D., para. 193). More importantly, the Joint Engineering Exhibit predicted that NTC would provide *first television service* to an area of 3,042 square miles and a population of 18,082 persons; RET would provide similar service to 18,066 persons in an area of 3,032 square

miles; Washoe to only 1,096 persons in an area of 1,124 square miles; and RCBC, RMBC, and Page would provide "white area" coverage to only 3,510 persons in an area of 1,287 square miles. Each of the applicants would also provide "grey area," or second television service coverage to the following areas and populations: NIT: 4,099 square miles, 22,808 persons; RET: 4,013 square miles, 22,777 persons; Washoe: 5,166 square miles, 25,020 persons; and RCBC, RMBC, and Page: 5,809 square miles, 28,066 persons (I.D., paras. 193-94).

9. Following the parties' submission of the Joint Engineering Exhibit, and despite their specific notice of the Commission's prior disposition of the engineering data contained in the proposals and counterproposals proffered over a period of some three years by STI, two of the applicants, RCBC and RMBC, now distancing themselves from the Joint Engineering Study that they had subscribed to, again interposed the same STI engineering study already considered twice, and rejected twice, by the Commission at the Rule Making stage to *rebut* the joint coverage areas and population figures contained in the Joint Study.

10. As recapitulated at length, *supra*, STI originally commissioned the preparation of those engineering reports to support its own self-interested attempt to prevent assignment of a competitive television channel to Reno in favor of its alternative proposal to assign the frequency to Redding, California (RCBC Exhs. 6, 8). STI, it is recalled, had argued to the Commission that a Channel 11 site on Peavine Peak could not yield any first or second service to the Susanville vicinity -- the very same argument that RCBC and RMBC reiterate in this proceeding (RCBC Exhs. 6, 7, 8). Again it was claimed that Susanville, with a population of more than 14,000 persons, is located in a hollow and because of the intervening terrain would not be expected to receive Grade B or better service. In an attempt to prove this point, STI's engineer had run only a single terrain profile radial from Peavine Peak through Susanville (RCBC Exh. 6, p. 3). STI's engineer had also contended that the terrain throughout the area projected for receiving a first or second service is extremely mountainous and not dissimilar to that terrain in the direction toward Susanville. He opined that, as a general rule, people reside at the lower elevations; thus, as in the case of Susanville, persons there would be blocked from obtaining direct off-the-air signals from a proposed Channel 11 service situated on Peavine Peak. (RCBC Exh.6, p. 3) (I.D., paras. 195-196).

11. Notwithstanding, STI would not allow its engineer to testify at this hearing proceeding or to be cross-examined concerning his calculations (Tr. 3031). Further, his "alternate" study did not take into account the entire proposed coverage area, nor did it reveal the areas and populations which would actually receive service from *any* party's application determined by this methodology of calculation (Tr.2964-2965). Additionally, counsel for RCBC (one of the applicants attempting to rebut the Joint Engineering Study) admitted at oral argument that RCBC simply did not want to spend the "incredible amount of money" involved in preparing a full engineering study utilizing this method of computation (Tr. 3030). In fact, NTC provided a statement from another registered professional engineer who disagreed with the STI data. NTC's engineer opined (NTC Exh. 12 at 2-3):

> The degree of shadow loss at any particular receiving site is not a function of the shadow depth, and the distance from the obstruction, but also the transmitter distance from the receiving site, the power and frequency of the transmitting station, and the natural characteristic of the obstruction (whether it is a "knife edge" or a rounded body). There are recognized mathematical methods of predicting the degree of shadow loss and the resulting grade of signal, none of which were presented in the [RCBC] Exhibits. Not even a threshold mathematical study has been presented to indicate the presence or absence of service, only general allegations that no service will be realized in practice in the shadowed areas. Furthermore, and of equal importance, is that even if mathematical shadow loss studies had been presented to show the degree of Peavine service in a particular area, such an exhibit would be meaningless unless similar shadow loss prediction studies had been performed on the projected signal of the other Channel 11 applicants at that particular receiving location together with the prediction of service from other TV service signals at that location computed on the same terrain shadow loss basis. Thus, the [RCBC] exhibits give no factual foundation for the conclusion that there is no Grade B service in the shadowed areas within the FCC predicted Grade B service from Peavine and that the first and second services claimed by the Peavine applicants will not in fact be realized.

12. For its part, the Commission's Mass Media Bureau strenuously objected to the admission of the so-called rebuttal engineering data, and it argued that the standard predicted method of determining areas and populations to be served (Section 73.684 of the Commission's Rules, 47 C.F.R. §73.684) is the appropriate method to be utilized herein. [1] Thus, the following colloquy at oral argument (Tr. 3083, 3085) is enlightening:

> [*Bureau Counsel*]: I did want to say that several people have suggested a remand to give the two opponents an opportunity to come in with further engineering. We would oppose that vehemently. They've had several opportunities to come in with their showing. We have a joint exhibit. They've made it very clear they do not think the joint exhibit is wrong except where it gives a preference to their competitors. They like it where it gives a preference to their clients.
>
> [*Board Member*]: Well, with all due respect, let me ask you this question because we're not engineers here. I hope you haven't inferred from anything you heard on the Board that there's any strong sympathy for a remand from the Board because I don't believe I personally would be inclined to allow those parties excepting to the joint study to go out now after the hearing is closed and do a Technote 101 study. They had that opportunity and they chose, for whatever their reasons were, not to do it and to rest their case, as it were, on the [engineering] study as interpreted by their own engineer.

* * *

> [Bureau Counsel]: . . . In a hearing proceeding, when we have a comparative coverage issue, you come in with the evidence, you come in with experts, you come in with evidence that is more or less reliable. And we have what we still call Technote 101 showings. We have showings that are computer based showings. You have whatever showing is persuasive to a presiding judge in a hearing proceeding. And we certainly do, since 1977, we certainly have had many occasions where people have come in. What we do require . . . is initially a threshold showing that the area - - that the elevation of the area varies in some substantial degree. They [RCBC and RMBC] have made that showing, that threshold showing, and they showed it to another engineer who said "this guy is right." I concede that they have made the threshold showing. I conceded that in our brief. *What they did not do was take the next step and come in with the alternative projection method, with the alternative contours or areas and [populations] figures; that is to say it's a failure a proof; they did not meet the issue as it was set forth in the designation order.*

Considering the foregoing, we subscribe fully to the Bureau's view that there has been a complete failure of proof by RCBC and RMBC that the Commission's standard prediction method is materially inaccurate or otherwise inapplicable in this proceeding. We further concur that no useful purpose would be served by remanding this proceeding to the ALJ for the adduction of further evidence, since the only two parties opposing the Joint Engineering Exhibit have openly declared that they refuse to spend what they describe as the "incredible" sums necessary to perform the alternative showing of predicted coverage permitted in accordance with *Technical Note 101, "Transmission Loss Predictions For Tropospheric Communications Circuits"*, by P.L. Rice, A.G. Langley, K.A. Norton and A.P. Borisi, published by the U.S. Department of Commerce, National Bureau of Standards (revised January 1, 1967). [2] The Board recognizes, of course, that making advance accurate predictions of VHF television signal contours in areas of irregular terrain is an historic (and still ongoing) problem. For example, just recently, the Commission granted extraordinary authority to a Puerto Rico VHF television licensee to conduct novel experiments to determine if a system of multiple, closely-spaced, co-channel transmitters could provide significantly better television service than a single standard transmitter in an area of extreme terrain variations and to specifically report findings of its experiment to the Commission. *Ponce Television Corporation (WLUZ-TV)*, 1 FCC Rcd 1167 (1986). Therein, the Commission speculated (at 1180-88):

> In fact, consideration of the effects of terrain on signal coverage and interference prediction methods in general has remained an ambiguous area. When the Commission adopted the signal propagation models contained in Part 73 of the Rules, it chose not to take advantage of several recognized methods to place stations more closely together. *See Sixth Report and Order (Television Assignments)*, 41 FCC 148, 180-83 (1952).

As the petitioners correctly observe, the Commission chose instead to reserve such possibilities as "safety factors" to prevent large amounts of unexpected interference. *Id.* However, it was also recognized at that time that those "propagation charts are sufficient to afford an adequate basis for describing field intensities *under average conditions*, but it is expected that there may be substantial variations in individual areas." (Emphasis added, *id.*, at 173, quoting *Third Notice of Proposed Rule Making*, FCC 51-244, released March 22, 1951.) In the 1980 *Notice of Proposed Rule Making (Table of Television Allotments)* [83 FCC 2d 51 (1980)], the Commission observed that those signal propagation models, developed without taking into account the effects of such factors as terrain shielding and precision offset, had proved to yield reasonably accurate predictions of service areas. 83 FCC 2d at 85. Further, the Commission stated that "only the terrain shielding effect is not yet amenable to precise quantification, and therefore not available as a tool to configure more efficiently the placement of VHF station allotments." *Id.* That fact is reflected in Section 73.684(f) of the Commission's Rules for predicting coverage, which permits an applicant to supplement contour showings based on normal prediction methods in cases where terrain may be expected to affect the practical limit of service. Thus, we believe that, because present models to predict the impact of severe terrain conditions yield results that are so uncertain, it is apparent that reexamination of those coverage prediction methods can be useful. Further, we conclude that such experimentation into the effects of severe terrain conditions on signal propagation, particularly in isolated areas, holds a reasonable promise of substantial contribution to the development of the broadcasting art.

13. In the case at bar, we conclude that we are bound by the evidence contained in the Joint Engineering Exhibit in this proceeding. No probative evidence has been submitted to persuasively demonstrate that the computations contained therein are materially inaccurate or otherwise unreliable. More importantly from our subordinate standpoint, the Commission itself has *twice* considered and *twice* rejected the very same engineering data submitted again to rebut the calculations contained in the Joint Engineering Exhibit. The Board simply has no authority to second-guess the Commission. We also hold that, in light of the long-standing imperative of the Commission contained in its *Sixth Report and Order, supra*, at 167 (Priority No. 1: To provide at least one television service to all parts of the United States), and the significant differences in the coverage areas proposed by the various applicants, this proceeding will dispositively turn on consideration of the best comparative applicant providing "first-service" (or "white-area" coverage) to the greatest number of persons. *See Tucson Community Broadcasting, Inc.*, 2 FCC Rcd 568 (Rev. Bd. 1987), *reconsideration denied*, 2 FCC Rcd 2860 (1987); *RAM Enterprises*, 57 FCC 2d 844 (Rev. Bd. 1976)(coverage preference including service to a substantial number of persons who did not have any such service outweighs both diversification and integration preferences), *review denied*, FCC 76-597, released June 24, 1976, *reopening denied*, FCC 77-36, released January 12, 1977. Here, there are only two such technically superior applicants: NTC (the prevailing applicant below) and RET. Both are in a virtual "dead-heat" with respect to areas and populations to receive "first service" (*see supra* para. 8). From a technical aspect, RCBC, RMBC, and Page are a distant second, and Washoe a remote third. Inasmuch as NTC and RET are virtually tied (NTC:

18,082 persons receiving "first-service" *versus* RET's 18,066 persons), we must next examine the other comparative attributes of these two technically superior applicants.

II. NEVADA TELEVISION CORPORATION

14. The prevailing applicant below was NTC. The principal exceptions filed against NTC by the losing applicants relate to the proposed integration of Luther Mack, a 45% voting stockholder of NTC. The exceptors, in essence, claim that the ALJ erred in awarding 100% integration to NTC because Mack, who is currently the franchisee of four local McDonalds restaurants, has not demonstrated on the record an ability to effectuate his proposal to devote fulltime to the operation of the NTC's proposed station since he has contractually obligated himself, through his binding franchise agreements with McDonald's, to devote "fulltime" to those business entities. For the reasons below, we reduce NTC's quantitative integration factor to 35%.

15. NTC's opponents asserted at hearing that Mack is bound by the clearest terms of his written franchise agreements with McDonalds, which agreements specifically require Mack to devote his fulltime efforts to the restaurant. Oddly, however, while the ALJ refused to admit into evidence actual copies of Mack's franchise agreements with McDonald's (which would seem to us to have reflected the best practical evidence of any conflicting commitments Mack had made in securing his McDonald's franchise agreements), he incongruously permitted Mack to offer parol testimony at complete variance with the plain terms of Mack's written contracts with McDonald's. Nevertheless, during cross-examination of Mack, substantial and material portions of the subject McDonald's franchise agreements were read into the record, and RBMC also attached an undisputed copy of one such agreement to its reply findings. In pertinent part, McDonald's standard franchise agreement provides that Mack shall personally operate his McDonald's franchise restaurant "through strict adherence to [McDonald's] standards and policies . . . ." (McDonald's License Agreement, para. 1(a)). Mack also admitted that McDonald's "basic business policy" requires ownership of the restaurant by someone "who will work *fulltime* at their McDonald's restaurant business." (McDonald's License Agreement, para. 1(b)(emphasis added). Even more specifically, paragraph 13 of the McDonald's License Agreement requires Mack to "diligently and fully exploit his rights in this License by *personally devoting his best efforts and* ... [*Mack*] *shall devote his fulltime and best efforts to the operation of the Restaurant.* "Finally, Mack is expressly required under the McDonald's License Agreement to *"keep free from conflicting enterprises* or any other activities which would be detrimental to or interfere with the business of the Restaurant" (*id.*).

16. Confronted with this explicit contractual barrier, the ALJ chose to rely instead upon Mack's own self-serving parol testimony that the "franchise agreements . . . do not in fact represent the entire understanding between Mack and McDonalds . . . in that there are additional, oral understandings (Tr. 2571, 2580-82, 2620-21, 2629-31, 2633)." The ALJ also "repeatedly admonished counsel . . . .that he would accept Mack's uncontradicted testimony . . . and that the exhibits of the written franchise agreements offered . . . were meaningless unless testimony of McDonald's officials or other evidence was offered in rebuttal to Mack" (I.D. para. 265). However, we agree with the exceptors that the ALJ erred in refusing to admit into evidence the Mack/McDonald's franchise agreement and in accepting, in lieu thereof, Mack's self-serving parol testimony at complete variance with the clear and express terms of that written agreement. First, it is uncontroverted that "Mack presently devotes up to 60 hours per week to his various business, professional, and civic activities (Tr. 2502, 2529-30, 2621-23)." (I.D., para. 136). Moreover, in NTC's own words, " . . . .Mack clearly stated that he intends to retain [these] interests because he believes no conflict will arise. Mack has steadfastly testified that he will divest his interests in the McDonald's franchise only in the unexpected event that McDonald's requires him to do so." (NTC Consolidated Reply to Exceptions, at 4-5, fn. "* *"; Tr. citation omitted). Under these circumstances, the heavy burden was plainly on NTC to affirmatively demonstrate the plausability and probability of Mack's conflicting fulltime broadcast integration proposal. For, indeed:

> It is both a long-held and routinely-applied principle of our comparative broadcast law that persons seeking comparative credit for ownership integration must demonstrate on the record how they can accommodate their outside professional and business activities so as to fulfill their specific commitments to the proposed station. *Margaret Garza*, 1 FCC Rcd 1294 (Rev. Bd. 1986); *Central Texas Broadcasting Co., Ltd.*, 90 FCC 2d 583 (Rev. Bd. 1982), *rev. denied*, FCC 83-415 (Comm'n 1983, *aff'd mem. sub nom. Blake-Potash Corp.* v. FCC, No. 83-2112 (D.C. Cir. April 26, 1985); *Blancett Broadcasting Co.*, 17 FCC 2d 227 (Rev. Bd. 1969).

Leininger-Geddes Partnership, 2 FCC Rcd 3199 (Rev. Bd. 1987), *review denied*, 3 FCC Rcd 1181 (1988). *See also Ft. Collins Telecasters*, 103 FCC 2d 978, 985-986 (Rev. Bd. 1986)(applicant with conflicting business interest denied integration credit in absence of strong evidentiary showing which resolves conflict), *review denied*, 2 FCC Rcd 1780 (1987), *aff'd by judgment*, No. 87- 1256 (D.C. Cir. Mar. 11, 1988). Second, the Board has made crystal clear that where an applicant's proposed integrated principal is contractually or otherwise expressly bound to fulltime employment elsewhere, we will not credit a fulltime integration pledge that expressly conflicts with such a prior commitment. *Knoxville Broadcasting Corp.*, 103 FCC 2d 669, 680-683 (Rev. Bd. 1986).

17. Here, Mack claims that, despite the express terms of his written franchise agreements with McDonald's, he was "told" (by a person or persons unknown) that he need not honor his written contract to devote his "fulltime and best efforts" to the four restaurants. Inexplicably, however, the ALJ placed the burden on NTC's opponents to produce "McDonald officials or other evidence" to rebut Mack's unilateral annulment of the McDonald's contracts. Just why, in light of the conventional evidentiary burden reiterated, for example, in *Leininger-Geddes* and *Ft. Collins*, the ALJ did not call upon NTC to produce "McDonald's officials" to corroborate Mack's breezy abrogation of the written contract is not explained in the I.D. But the law ordinarily teaches that:

> The failure to bring before the tribunal some circumstance, document, or witness, when either the party himself or his opponent claims that the facts would thereby be elucidated, serves to indicate, as the most natural inference, that the party fears to do so, and this fear is some evidence that the circumstance or document or witness, if brought, would have exposed facts unfavorable to the party.

2 WIGMORE ON EVIDENCE §285 (1940); *see also* McCORMICK ON EVIDENCE §272 (1984)(espousing the "classic" statement of the law to be that "if a party has it peculiarly in its power to produce witnesses whose testimony would eludicate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable" (footnote omitted)). Here, the ALJ inverted the "classic" evidentiary presumption, as well as the Commission's general evidentiary burden that the applicant itself make a strong persuasive showing that it can overcome facially apparent barriers to a fulltime integration proposal. And, as we view the record, NTC conspicuously failed in its burden to overcome Mack's conflicting contract with McDonald's. Although Mack claims that McDonald's is not serious about Mack's fulltime pledge to *them*, we know *not* what Mack may have orally told McDonald's about the seriousness of any *identical* pledges he has made to this Commission. With four McDonald's restaurants to personally manage, Mack already has his burgers and buns scattered widely about the Reno area. His ambitious proposal to personally manage (fulltime) a new VHF television station on the side, as it were, would require a much bigger Mack than we have encountered here. We deny Mack's fulltime integration proposal.

18. The next problem with NTC's integration proposal, and one requiring a further reduction of its quantitative integration factor, stems from the equity interest of Steven T. Walther, who is represented as owning 20% of NTC's total equity (I.D., para.123), but who has been denominated a "nonvoting" shareholder in the corporation. As local counsel, Walther did provide significant legal services for NTC, including the drafting of all of its corporate documents (Tr. 2146-47). Several exceptors, citing to the Commission's *Clarification on Ownership Attribution*, 1 FCC 2d 802(1986), argue that Walther can not be considered a "passive" investor (thus permitting NTC to exclude his equity interest from quantitative integration calculations). In its *Ownership Attribution* statement the Commission declared:

> it would be difficult to envision legal services that are more directly related to the media activities of the partnership than those concerning the licensing and operation of broadcasting entities.
>
> * * *
>
> A partner whose contribution to the partnership is in the form of personal services and expertise rather than in the form a financial investment is the *antithesis* of a passive investor.

Ownership Attribution, 1 FCC Rcd at 804 (emphasis added). As recently discussed in *Mark L. Wodlinger*, FCC 88R-29, adopted May 12, 1988, 3 FCC Rcd (Rev. Bd. 1988), the Commission's focus in its *Ownership Attribution* clarification was on attorneys who also held "limited" partnership interests in an applicant or a licensee. *See Wodlinger* at para. 9 & nn. 3-4. However, after analyzing the Commission's reasoning, the Board in *Wodlinger* stated that it could not "off hand discern any principled legal basis for treating limited partner attorneys as conclusively 'active' principals, while treating in precisely the opposite fashion attorney principals of corporate applicants . . . ." *Id.* at n. 4. We went on to hold that:

> Accordingly, unless and until further Commission guidance on this point is available, the Board will treat uniformly the ownership interests of attorneys who perform legal services for an applicant: both classes of attorneys ("nonvoting" stockholders as well as "limited" partners) will be conclusively regarded as "active" principals for purposes of all of our various comparative analyses.

Id. Accordingly, Walther must be considered an "active" principal who does not propose to integrate into station management. Hence, having denied Mack's 45% integration proposal, and factoring into our integration calculus Walther's 20% equity interest, NTC is entitled to only a 35% quantitative integration credit. *See Mark L. Wodlinger, supra.* [3]

19. Finally, we affirm the ALJ's award of integration enhancement for NTC's racial and gender characteristics. *See Cannon's Point Broadcasting Co.*, 3 FCC Rcd 864 (1988). NTC integration factor of 35% is also enhanced by the local residence of three principals and for their civic activities in Reno, as well as Karen Zupon's broadcast experience.

III. RENO-ELEVEN TELECASTERS

20. RET claims 100% integration credit for its three General Partners, David Ward, Deborah McGuire, and Robert Still. RET purports to be a Nevada limited partnership, whose present configuration includes each of the aforementioned "General Partners" (who purportedly have "ten votes" each as "general partners") but are, at the very same time, also listed "limited partners" in RET. Additionally, after the "B" cut-off date in this proceeding, RET also added additional "limited" partners, Gary Krone, and Carol Ann and John Badwick (as joint tenants). Thus, at the present time, the equity of RET is claimed to be as follows: Ward, 29.9%; Krone, 27%; McGuire, 20.1%; Still, 18.5%; and the Badwicks, 4.5%. Krone, however, also possesses an option to acquire up to 48% of the total equity in RET in consideration for making available up to150,000 to RET for legal expenses incurred in the prosecution of its application (I.D., paras. 34-35 & n. 28).

21. A review of the formation and subsequent activities of RET revealed that Ward was the initial RET principal to learn of the availability of Channel 11 in Reno in late 1984. He saw an advertisement in the *Reno Gazette Journal* in which a communications law firm sought applicants to apply for the new VHF television channel (Tr. 491). Shortly thereafter, Ward conceived of RET as a limited partnership, and in December 1984 and February of 1985,

Ward contacted McGuire and Still to ascertain their interest in the application. The original RET partnership agreement, effective on both the "B" cut-off date and on the date RET filed its integration statement with the ALJ, provided for the allocation of profits and losses in proportion to the number of limited partnership units held by the partners. The original RET agreement also provided that the "general" partners would have exclusive charge of the partnership's business, although it contained no express restrictions on the participation of the limited partners in management (I.D., paras. 36-37).

22. In December 1985, Ward approached Krone, whom he had known for approximately five years and had business dealings with, to ascertain his interest in becoming a participant in RET's application (Tr. 520-21). But neither McGuire nor Still knew Krone nor discussed with him his participation in RET at the time Ward recruited Krone to RET (Tr. 1033, 1052-53). Ward conducted face-to-face negotiations with Krone and his attorney concerning amendments to the RET limited partnership (Tr. 523-24, 6730), and Ward purportedly kept his partners informed about these negotiations (Tr. 661-663; 672-673).

23. The new RET partnership agreement was drafted to reflect the changes Ward negotiated with Krone (Tr. 671), and was subsequently revised by Ward to meet Krone's demands (Tr. 676-77). A formal amendment to RET's partnership agreement was executed on February 25 and 26 by Ward, Still, McGuire, and Krone to conform to Krone's specifications (Tr. 687-88). The new RET agreement provided that:

> In no event shall the death, disability, or withdrawal of any of the general partners result in the remaining partners having an equal number of votes which would create a deadlock. Under such circumstances, the limited partner who is not a general partner and who owns the largest number of limited partnership units shall designate which of the remaining general partners shall have the control ....

I.D., para. 40.

24. According to Ward, RET's partners orally agreed that the amended agreement would not be recorded with the county clerk until approved by communications counsel (Tr. 677). After that consultation, RET's partners amended the provision dealing with a potential deadlock on March 27, 1986 (the same day, in fact, that RET's principals were deposed in this proceeding) to provide that, upon a deadlock, the general partner with the largest number of "limited" partnership units shall become the managing partner and be given the additional vote (Tr. 677-78, 685-87; RET Exh. 1 at 15-22). This amendment also provided that limited partners had no voting rights, and should refrain from involvement in any material respect in the management of any station owned by RET. (RET Exh. 1 at 16). Further, Krone may make loans to RET or act as a surety for RET's business (*id.* at 16-17). In fact, RET contemplates allowing Krone a "first option" on lending necessary funds to RET (Tr. 695). The amended partnership agreeement incorporated Krone's demand for a restriction on the compensation of RET's general partners (*id.* at 18, 10.1). And, at Krone's insistence, the agreement was amended to require distribution to the limited partners of at least 25% of its profits (*id.* at 18). Finally, in January 1986, a side agreement between Ward and Krone was consummated requiring that Ward personally serve as General Manager of the proposed facility for at least 5 years, as a precondition to Krone's investment (Tr. 748-749).

25. We hold that RET is not entitled to any integration credit on two separate and distinct grounds. First, we concur with the ALJ that no integration credit can be awarded because RET's three "general" partners are simultaneously "limited" partners of RET; and indeed, none of RET's partners have any distinct ownership in the partnership as "general" partners (merely "ten votes" each). RET's partnership agreement prohibits its "limited" partners from voting on partnership business and from being involved in it's day-to-day affairs. RET's three purported "general partners" are thus, and paradoxically, empowered to *manage* the station and yet *simultaneously forbidden to manage* the station at the very same time.

26. In somewhat similar circumstances, we have denied integration credit for a "limited" partner who was also said to be a "general" partner. *See Cotton Broadcasting Company*, 104 FCC 2d 473, 475-476 (Rev. Bd. 1986), where we observed:

> Although North Carolina limited partnership law appears to permit a person to serve as both general partner and a limited partner (I.D., para. 25, citing N.C. Stat. § 59-12), the Commission is not bound by State law when applying the Commission's ownership integration policies. *See Bradley, Hand Triplett*, 89 FCC 2d 657, 662-63, 51 RR 2d 383, 387 (Rev. Bd. 1982). And it is quite clear that Commission case law does not permit any ownership integration credit or even a lesser "merit" for limited partners who also participate in the management of a proposed station. *Greater Wichita Telecasting, Inc.*, 96 FCC 2d 984, 989, 55 RR 2d 926, 930 (1984). The purpose behind our award of integration credit is to strengthen the bond between legal responsibility and day-to-day management authority. Since limited partners are supposed to be "passive investors [who] have no authority to control the licensee," *Anax Broadcasting, Inc.*, 87 FCC 2d 483, 488, 48 RR 2d 1589, 1594 (1981), their integration or lack of integration is inconsequential. *Greater Wichita Telecasting, Inc., supra.* In the instant case LBC's partnership agreement . . . is self-contradictory. On the one hand, it deprives [a] partner . . . of all managerial authority, while on the other hand it authorizes the same [principal] to be a general partner with "complete and exclusive" managerial authority! Whether or not such a Janus-like arrangement comports with North Carolina law, it cannot be countenanced for ownership integration credit. We are compelled to take LBC's *limited partnership* agreement at its word and to treat [that principal] as a limited partner for ownership integration purposes. Hence, no credit can be awarded for her general partner activities . . . .

27. The blurring of the lines between RET's "general" and "limited" partners, and their authority and their activities, becomes even more evident when examining the dominating role Krone has played in the partnership activities of RET. Thus, we concur with the ALJ that even if RET's limited partnership structure did not require a denial of integration credit pursuant to *Cotton*, we would not consider Krone to have been merely a "passive" inves-

tor. Whereas Krone (who is not proposed to be integrated) is alleged to possess no active role in RET's corporate affairs, Krone has exercised important *de facto* control over RET. For example, Ward and Krone were primarily responsible for drafting the terms of RET's existing limited partnership agreement. In negotiating and drafting RET's agreement, Krone exercised significant power over the business and affairs of RET by insisting on the authority to restrict the compensation received by the general partners. Krone also determined that RET would distribute at least 25% of its profits to the four limited partners and he likewise demanded that he have the first option to make loans to RET. As a result, the partnership agreement was modified accordingly. Finally, Krone demanded that Ward serve as General Manager of RET's proposed station for at least 5 years, the two entering a side agreement to this effect. Of course, the Commission has described *de facto* control as the ability to "dominate" corporate affairs. *News International, PLC*, 97 FCC 2d 349, 356 (1984). Thus, in dictating the most crucial terms of RET's governing documents, Krone had already dominated RET's affairs and activities in the most vital respects. Apparently needing Krone's money to even prosecute its application (Tr. 3002), the other partners simply submitted to Krone's numerous demands. In light of Krone's dominance of RET, RET's claim that Krone is "passive" is its affairs is belied by the clearest empirical evidence. Here, we agree with the ALJ that the record evidence, taken as a whole, clearly demonstrates that Krone has, and would, exercise dominion and control over RET. Thus, for the reasons enunciated hereinabove, RET is not entitled to receive any integration credit.

28. As we have indicated, *supra*, this proceeding will turn on the determination of the best applicant otherwise providing first television service to the greatest number of persons. Clearly, NTC is that applicant, since its 35% integration credit and qualitative enhancements obviously outweight RET's 0% integration. However, for purposes of completeness, we will briefly examine the remaining applicants in this proceeding.

IV. RENO MINORITY BROADCASTING COMPANY

29. Several of the exceptors challenge the *bona fides* of RMBC's ownership structure and the award to it of a 100% quantitative integration factor by the ALJ. Succinctly, the exceptors insist that no RMBC principals (*i. e.*, Allianic, Sepulveda, or Nunez) should receive integration credit, because, they argue, the RMBC stockholders' had only an oral commitment as of the "B" cut-off date to pay for stock and because the stockholders had not executed a stock subscription agreement prior to the filing of RMBC's integration statement. In this regard, the exceptors rely on *Houston Family Television Ltd.*, 101 FCC 2d 661, 667 (Rev. Bd. 1985). However, the situation at hand is unlike *Houston Family* because, here, the stock subscriptions of RMBC's principals were evidenced in writing *prior to* the filing of its integration statement; and in fact, prior to its corporate existence. Thus, in the local public notice of its "B" cut-off date application amendment (published in August and September 1985) RMBC fully disclosed that Ulloa, Nunez, Allianic and Sepulveda were each officers, directors, and shareholders of RMBC. Moreover, RMBC filed its Articles of Incorporation on June 20, 1985, prior to the "B" cut-off date, which Articles specifically listed Ulloa, Nunez, and Allianic as Directors of RMBC. (RMBC Ex. 7). At the same time, RMBC's "B" cut-off date amendment (filed June 26, 1985), expressly stated that Ulloa owned 75% of the common voting stock, Nunez 15%, and 5% each for Allianic and Sepulveda. The record here thus reflects that the RMBC shareholders had committed to a specific ownership structure as early as the "B" cut-off date amendment. In light thereof, RMBC's integration proposal (except as as modified *infra)* will be partially credited. *See Pacific Television, Ltd.*, 2 FCC Rcd 1101 (Rev. Bd. 1987), *aff'd*, 3 FCC Rcd 1700 (1988). On the other hand, we agree with NTC's exceptions that fulltime integration credit cannot be awarded for Gus Nunez's proposal because of his substantial activities as a Reno City Councilman. At hearing, Nunez had indicated that his councilmanic activities would occupy around 30 hours per week, sometimes more (Tr. 1153). Under these circumstances, we cannot assume that Nunez will neglect his official public duties or accord them a priority secondary to his private economic interests. *See Voce Intersectario Verdad America, Inc.*, 100 FCC 2d 1607, 1614 (Rev. Bd. 1985)(only slight integration credit awarded where principal simultaneously served as state senator); *Leininger-Geddes Partnership, supra* (principal with active interests as attorney and state representative denied fulltime integration credit); *Jarad Broadcasting, supra; Berryville Broadcasting Co.*, 70 FCC 2d 1 (Rev. Bd. 1978)(fulltime integration credit not awarded to principal proposing 70-hour work week). In fact, Nunez's overambitious integration claim is rendered more implausible by his plans to retain his successful, wholly-owned, engineering company where he works as the chief draftsman and engineer for his personal engineering clients. While Nunez said he would reduce his committments to his engineering firm, this claim is too indefinite to credit. *See Washington's Christian Television Outreach, Inc.*, 99 FCC 2d 395 (Rev. Bd. 1984)(subsequent history omitted); *Ft. Collins Telecasters, supra.* As noted *supra*, individuals seeking integration credit must affirmatively demonstrate on the record precisely how they can accommodate their other substantial professional or business activities. *Leininger-Geddes Partnership, supra.* Nunez has failed in this showing.

30. RMBC, therefore, receives an 85% fulltime quantitative integration factor, and - at best - a 15% parttime credit for Nunez. It also receives 25% local residence and civic involvement credit (for Nunez, Allianic, Sepulveda), along with some slight residual credit for Ulloa's proposal to move to Reno. Finally, RMBC receives its sexual enhancements as well as an 80% (Allianic, Ulloa) broadcast experience credit. However, we repeat that even if RMBC were to receive the 100% quantitative integration factor it seeks, it could not prevail over the "comparative coverage" preference of NTC.

V. RENO COMMUNITY BROADCASTING COMPANY

31. RCBC is represented to us as a Nevada limited partnership, whose two "general" partners are Valerie Glenn and Jessica Ordonez. Each lays claim to a 10% "general" partnership interest, and Glenn claims an additional 10% "limited" partnership interest. I.D., para. 89. Jessica Ordonez is the twenty-one year old daughter of Bob Ordonez, who is an owner of radio stations KCBN(AM) and KRNO(FM), also located in Reno. *I. D.*, paras., 114, 121. Having reviewed the entire hearing tran-

script, we find her claims as both a "general" partner and future "Station Manager" to be, charitably speaking, absurd. In *Pacific Television Ltd., supra*, at paras. 4-5, the Commission upheld a determination that one of the applicants there, Obispo Television, was an utter sham and not entitled to any integration credit because, *inter alia*, one of its alleged principals had not, in fact, participated in any partnership decision-making nor did that person even see the application before filing. Moreover, the acts of the so-called "partners" there were inconsistent with the applicant's own putative integration proposal. Here, the circumstances are, if anything, more damning with respect to RCBC.

32. Specifically, Jessica Ordonez was not present at the partnership's organizational meeting in San Francisco; her name was not even mentioned as a prospective principal (Tr. 1845-46). Nor did she, for example, participate in selecting RCBC's other partners, or in apportioning the equity of RCBC (Tr. 1963). Indeed, she had no idea how the partners became involved (Tr. 1961-62), nor had she so much as met or spoken with other "principals" McKinley, Morrissey, Kale, Bengston, or Draper (Tr. 1961). It appears that, in March 1985, Valerie Glenn contacted Bob Ordonez, Jessica's father, to discuss the availability of Channel 11 (Tr. 1847-1934). He suggested to Glenn that his young daughter, Jessica, might "enhance" Glenn's application (Tr. 1848). Glenn then discussed the possibility of adding Jessica to the application with her own father, Phil Rose, her husband John Glenn, and with others (Tr. 1848), and shortly thereafter, Glenn lunched with Jessica (Tr. 1859-61). Several days later, Glenn met with Bob Ordonez and Jessica to discuss the RCBC initiative (Tr. 1860-61). Ordonez then negotiated with Glenn on behalf of his daughter (Tr. 1861, 1934), the primary matters being the magnitude of young Jessica's potential equity interest and the price of any such interest (Tr. 1933-34). When Jessica expressed uncertainty about her financial ability to make the required contributions, it was proposed that Jessica could make her contributions *if and as she was able to do so* (Tr. 1862)(I.D., paras. 91-93). However Jessica had no voice in determining the amount of initial partnership contributions (Tr. 1967). For her part, Glenn was given her 10% limited partnership interest by the other principals in exchange for alleged "services rendered" (RCBC Ex. 7; Tr. 1864). Jessica paid600 as an initial capital contribution, an amount she received as compensation for alleged "services" rendered to RCBC (Tr. 1975, 1978). However, the record reflects that Jessica has provided no services to RCBC, save for "reviewing" RCBC's EEO statement, which statement had already been prepared by Valerie Glenn (Tr. 1938), and for filing some "document" with the State of Nevada. But, at hearing, Jessica could not identify, nor even remember, what that purported document contained (I.D., para. 95).

33. Jessica Ordonez had no material involvement in the preparation or the prosecution of RCBC's application, or even in the retention of RCBC's legal counsel or its engineering consultant. She never discussed the financial qualifications section of RCBC's application with Glenn, nor did she contribute to the preparation of RCBC's program service statement (Tr. 1928-39, 1852, 1938); she was unaware of the identity of RCBC's engineer, and did not even know who hired that engineer (Tr. 1939); she did not participate in hiring or selecting legal counsel, and did not know who, in fact, had hired FCC counsel (Tr. 1939-40).

34. The record further reveals that, on June 24, 1985, RCBC amended its application to state (1) that its Limited Partnership Agreement had been signed, (2) that its Certificate had been filed with the Secretary of State of Nevada, and (3) its Limited Partnership Agreement conformed to the Uniform Limited Partnership Act. However, Jessica Ordonez did not know who prepared RCBC's June 24 amendment, and she did not even see that amendment until *after* it was filed (Tr. 1940-41). Also, subsequent to the "B" cut-off date, RCBC filed three additional amendments to its application. Yet, Jessica Ordonez did not assist in the preparation of any of these amendments, and did not even know who prepared these vital amendments (Tr. 1941-43)(I.D., paras. 100-101).

35. In October or November of 1985, RCBC held a second partnership meeting to discuss additional capital contributions (Tr. 1967). Phil Rose, Walsh, Kelley, and the two "general partners" attended this meeting (Tr. 1867). After this meeting, Glenn, who authored all of RCBC's correspondence, issued a memo on November 20, 1985 requesting that additional capital contributions be made, whereupon Jessica paid in only 300 of the2,500 amount she then owed (Tr. 1856). According to Glenn, Jessica was permitted to make the remainder of her payments *if and as* she became financially able (Tr. 1856-60). But, as of June 1986, Jessica had not paid any of the remaining amount due RCBC pursuant to the November 10, 1985 capital call (Tr. 1946).

36. Several weeks before the hearing, RCBC held its third partnership meeting to discuss, again, the need for additional capital (Tr. 1867-68). Rose, Walsh, John Glenn, Kelly, Bengston, and the two "general partners" attended (Tr. 1868). Subsequently, on May 20, 1986, Glenn issued still another capital call (RMBC Exh. 9; Tr. 1854-55, 1964-65). The contributions, which were to be made in equal monthly payments over a five month period commencing June 1, 1986, were identical to those required by the November 20, 1985 capital call (RMBC Exhs. 8, 9). However, although Jessica Ordonez's first installment of500 was due on June 1, 1986, she had contributed only50 more as of that date (Tr. 1948). RCBC asserts that Glenn and Ordonez have apparently agreed that Ordonez will remit 20, every 2 weeks, until her obligation is satisfied (Tr. 1948). Glenn testified that capital remittances are sent to her when due, because she maintains RCBC's checking account and she alone writes all RCBC checks (Tr. 1864, 1963). Furthermore, Glenn alone is responsible for conducting RCBC's day-to-day business (Tr. 1965-66). By contrast, Jessica Ordonez is *not* involved in the day-to-day business activities of RCBC, nor has she ever issued any partnership correspondence or signed any RCBC checks (Tr. 1963- 64)(I.D., paras. 103-106).

37. Still, RCBC insists that the 21-year old Jessica Ordonez will be the "Station Manager" of a new full power VHF television station. Yet, as to her putative responsibilities, Ordonez responded that her responsibilities will be to *"assist"* Glenn, and do whatever Glenn delegates to her (Tr. 1952-53, 2008). Glenn, however, will hire all employees, and Ordonez will not have the power to hire or fire. (Tr. 1955, 1990). Ordonez says she will be *"assisting"* Glenn in traffic, programming, and compliance with FCC rules (Tr. 1952). Glenn will be responsible for programming, and Ordonez will *"assist"* Glenn, she says, in assuring that things "run smoothly " (Tr. 1952-53). Jessica did not know, however, whether the station would have a

program department or a program director (Tr. 1953, 1988), nor did she know who would determine the station's program policy (Tr. 1953, 1988).

38. In sum, RCBC's claims that Jessica Ordonez is, and will be, a managing partner of the applicant are revealed on this record as nonsense; its proposal is nothing more than a contrived attempt to manipulate the Commission's comparative process. However, even if we awarded a 50% quantitative integration factor for Glenn's role or - even more - awarded RCBC the full 100% integration credit it seeks, it still could not here prevail over NTC.

VI. PAGE ENTERPRISES, INC.

39. Page is the current licensee of KAME(TV), an existing UHF television station in Reno. It did not file reply exceptions or participate in oral argument. It seeks only a maximum 20% integration credit and bases its entire case on the assertion of inherent "equitable considerations." For that, it relies loosely upon *Knoxville Broadcasting Corp.*, 103 FCC 2d 669 (Rev. Bd. 1986), in which a local UHF licensee was the winning applicant for a newly available VHF television frequency in that same community. Page submits (Exceptions at pps. 7-9):

> While the Presiding Officer in the instant proceeding recognized that certain other equities favored the UHF incumbent in *Knoxville*, including the threatened loss of network affiliation and the existence of a broadcast track record of some 30 years, there are comparable equities in favor of Page in this proceeding which were erroneously ignored by the Presiding Officer. Thus, because there are at present *three* network-affiliated VHF stations serving Reno, the subject VHF allocation will likely be an independent facility *directly* competing with Page for audience, programming, advertising and revenues. [Footnote omitted].
>
> Despite these operational handicaps, Page has developed extensive ties with the Reno community and demonstrated its commitment to public service and a wide variety of charitable causes within the Reno market. Page has broadcast some 18 telethons for organizations such as the March of Dimes, the Arthritis Association, the American Heart Association and the Humane Society, sometimes devoting up to 12 hours of programming at a time to these telethons. Indeed, given that Page operates as a *non*-affiliated station as well as in the UHF band, its commitment to public service is particularly worthy of special consideration herein. Not being able to rely upon the natural audience which flows to any of the major network affiliates, Page's charitable programming endeavors stand as prominent testimony to its devotion to public service.
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> * * *
>
> The Judge's narrow construction of case precedents plainly places Page in a "Catch-22": its non-affiliated, UHF status impedes access to the revenues necessary to sustain the "superlative" programming decreed by the Judge, yet its future VHF competitor on Channel 11 will diminish even further the relatively scant revenues which are available to Page as an independent UHF operator.

40. Despite these pleas, the Board is unable to honor Page's exceptions. Although Page invokes *Knoxville*, where the Board did award a new VHF television Construction Permit to an existing UHF television licensee because of that particular licensee's "past broadcast record" in that very same community, *Knoxville* is not controlling here for several reasons. First, and unlike *Knoxville*, where after a highly unprecedented and controversial VHF "drop-in" proceeding the Commission *specially* invited any adversely impacted UHF licensee to rely upon its past performance in the community to establish its comparative superiority (*see VHF TV Top 100 Markets*, 63 FCC 2d 840, 892 (1977)), the Commission extended no such special invitation in the case at bar. Additionally, of course, this case is not, technically speaking, a VHF "drop-in" such as occurred in *Knoxville* (and in three other specific television markets), and second, as we discussed at some length in *Knoxville* itself:

> In the everyday comparative licensing case, a "past broadcast record" will not be accepted into record evidence unless an applicant seeking extra credit for its prior programming first motions for a separate comparative issue accompanied by a threshold evidentiary showing "of the unusual nature of a licensee's past broadcast record . . . " *Gilbert Group, Inc.*, 49 RR 2d 1081, 1082 (1981).

103 FCC 2d at 690-691. *See also Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 398(1965) (broadcast record not probative unless licensee's record is "unusually good or unusually poor) Here - and unlike in *Knoxville* - *Page affirmatively declined* the opportunity to make the evidentiary showing requisite to comparative consideration of its "past broadcast record." It candidly concedes that:

> Page did not "attempt" to proffer evidence of a past broadcast "record", in the sense of a summary of programs produced to meet particular community needs. Indeed, Page specifically stated at the prehearing conference that it would *not* present a threshold showing in that regard.

Page Exceptions at 11. Indeed, Page goes on to stipulate that (*id.*):

> Rather than urging the superiority of its broadcast "record" in the traditional sense, Page acknowledged that its status as small-market, non-affiliated, UHF television station in competition with three network-affiliated VHF stations has largely disabled it from "superlative" programming undertakings such as described by the Judge.

Hence, the ALJ was correct in measuring Page against its competitors only in accordance with the *other* substantive criteria set out in the 1965 *Policy Statement* and in refusing to grant to Page the unprecedented "charitable" preference it here seeks. *Compare also Farragut Television Corp.*, 8 FCC 2d 279 (1967), where the Commission

awarded a new television construction permit to a local licensee that had proven through its past broadcast record "the vision and ability to operate broadcast facilities *in response to the current needs of the listeners*, and to meet such needs by timely programs, *on both a regular and a special basis* . . . " *Id.*, at 284 (emphasis added). Having frankly conceded the absence of an evidentiary record evincing "programs produced to meet particular community needs," Page cannot rely on *Knoxville* where the winning applicant supplied a "past broadcast record" that more than met the Commission's *Farragut Television* standard. Thus, even if we were to award it the 20% integration factor sought, Page simply could not prevail in this proceeding.

VII. WASHOE SHOSHONE BROADCASTING

41. Washoe is here represented as a Nevada limited partnership consisting of Minnie O. Foulk and Renee Biselli, who each own a 5% equity interest and who are purportedly Washoe's joint 50% "general partners." Edward Bowlds, a broadcast licensee and television minister, owns 90% of Washoe's total equity, but was represented as merely only a "limited partner." As we noted in para. 1, *supra*, Washoe was encumbered with, *inter alia*, a misrepresentation issue in this proceeding.

42. We fully agree with the ALJ that Washoe has deliberately misrepresented material facts to the Commission, and is therefore unqualified to be a licensee. Although, as indicated, Washoe is comparatively inferior and could not in any event prevail in this proceeding, we review the exceptions pertaining to its disqualification.

43. Washoe's original application was signed by Foulk on March 16, 1985 (Tr. 2828), and filed with the Commission on March 28, 1985 (Tr. 2826). In signing the application, Foulk certified to Washoe's financial qualifications. However, while contradictory and inconsistent, Foulk's later testimony (and that of the other Washoe principals) proves indisputably that Washoe did not even *estimate* its costs of constructing and operating its proposed station when it swore to its financial qualifications (I.D., paras. 198-199).

44. At the initial hearing on June 3, 1986, Foulk testified that, prior to certifying Washoe's application, she had estimated the costs of constructing and operating its television station to be somewhere between 750,000 to2,000,000 (Tr. 174). She claimed that she had derived this broad "range of costs" from information she had obtained from a sales representative of Trinity Broadcasting Network (TBN) in 1982 or 1983, several years before Washoe's filing for Channel 11 (Tr. 174-76). However, Foulk later "clarified" her earlier testimony, there admitting that her conversation with the TBN representative was limited exclusively to the cost of bringing TBN's religious programming to Reno *via* cable. (Tr. 2837-38). But, the basic costs of constructing and operating a new VHF television station were not, in fact, discussed with that TBN representative (Tr. 2838). Additionally, at the first hearing session, Foulk vowed that she did not even ask Bowlds (the licensed broadcaster who owns 90% of Washoe) just how much it might cost to construct and operate a new VHF television station in Reno; such costs, she said, were discussed only in the most general terms (Tr. 173, 175). Foulk there insisted that no specifics were discussed regarding the proposed Reno television station, and that Bowlds himself never suggested specific cost figures (Tr. 175, 178). Foulk could not remember, she claims, whether Bowlds said anything about the "range" of cost estimates she claimed to have gotten from the TBN representative (Tr. 173, 175, 178- 79, 184-85) (I.D., para. 201).

45. At her October 30, 1986 deposition, Foulk declared that the Washoe principals had not engaged in any precertification discussions about the projected costs of constructing and operating its proposed Reno television station. Indeed, Foulk's deposition indicated that Bowlds projected a cost "range" sometime *after* the date (March 16, 1985) on which Foulk certified Washoe's application (Tr. 2830-31, 2835-36). Hence, Foulk was not relying on any specific cost estimates at the time she attested to Washoe's basic financial qualifications (I.D., 202).

46. Despite her June 3, 1986 testimony, and her deposition of October 30, 1986 to the contrary, Foulk later testified (on November 20, 1986) that Bowlds did provide a range of costs - from750,000 to 2,000,000 - prior to March 16, 1985 (Tr. 2833-34). But, Foulk's husband (John Foulk) who also attended both initial meetings with Bowlds, contradicted his wife and swore that Bowlds *did not* provide Washoe with any such "range" of projected costs (Tr. 2891). Indeed, Bowld's own version of Washoe's cost projections also changed from his first hearing testimony to his second. At the first hearing, Bowlds testified that he told Minnie Foulk in February 1985 only that the costs could vary widely - *i. e.*, from700,000 to5,000,000 (Tr. 819-820). Yet, at the second hearing (five months later), Bowlds stated that he originally (in February 1985) told Foulk that UHF television stations could cost from1,500,000 to2,000,000, but that VHF stations could cost "as little as"700,000 to build and operate (Tr. 2925-26). Bowlds' second hearing testimony claimed that he had itemized, in detail, the various costs of constructing and operating a television station at his February 1985 meetings with the Foulks (Tr. 2929-31). However, Bowlds could not recall whether he itemized any other projected costs, and he claimed that he jotted the figures down on a restaurant napkin. (Tr. 2933-36). In direct conflict, the Foulks themselves maintained that Bowlds had never provided any itemized breakdown of projected costs, on a napkin or elsewhere. (Tr. 173, 178-79, 2830, 2891).

47. Washoe's principals also gave conflicting testimony regarding its alleged source of funds. At different times during the hearing, Washoe claimed to be relying on (1) Bowlds alone; (2) Bowlds and the Foulks; (3) Bowlds' non-stock, non-profit corporation, Way of the Cross Outreach, Inc. (Way of the Cross); and (4) Way of the Cross, Security National Bank of Nevada, Bowlds, *and* the Foulks. At the initial June 1986 hearing, Foulk testified that when she certified to Washoe's finances, she was tacitly relying on funds to be provided by Bowlds, though (perhaps) the Foulks might contribute if necessary (Tr. 180-81, 188-89, 191). Foulk believed Bowlds' funds were "reliable" because Bowlds orally told her so. And she said, the Foulks "had a pretty good financial statement themselves" (Tr. 188-89). However, at no time prior to March 16, 1985, did Bowlds provide any tangible evidence of his resources, and Foulk conceded that the Foulks, alone, did not have sufficient liquid assets on hand to meet Washoe's financial requirements, whatever "range" they might fall into (Tr. 180-91).

48. When asked at hearing: "Did you have a statement of intention from anyone other than Bowlds to provide capital for you?", Foulk answered: "No" (Tr. 191). She then, carefully and explicitly, excluded Way of the Cross as a potential benefactor, testifying that Bowlds "just said he had the funds" (Tr. 180). Several times, Foulk insisted that no one other than Bowlds himself had committed to providing Washoe's capital (Tr. 191). But, at the second hearing on November 20, 1986, Foulk directly contradicted her prior testimony by stating that at the time of her original financial certification, she was, in fact, relying on Way of the Cross, and not just Bowlds, personally, to meet Washoe's basic expenses. When asked: "So were you looking to Bowlds personally for the funds or Way of the Cross"?, she replied, "No, Way of the Cross." (Tr. 2783). In further conflict with her initial testimony, Foulk swore at the second hearing that she had always interpreted "[we] have sufficient funds" to mean "Way of the Cross" had sufficient funds (Tr. 2839).

49. Nevertheless, Washoe's Opposition to NTC's Petition to Enlarge, filed on August 13, 1986, corroborates that Foulk was *not* relying on Way of the Cross to provide funds when she initially certified as to Washoe's basic financial qualifications (NTC Exh. 34, Opposition, filed August 13, 1986 at 5-6). That pleading declared: "Ms. Foulk testified that at the time she signed her application she was relying upon two sources of capital: a 200,000 commitment from her limited partner, Mr. Bowlds, and her own resources (Tr. 188-90)." NTC Ex. 34 at 5; Tr. 2861. Indeed, at no point in Washoe's opposition pleading did Washoe suggest that any (or all) of its funds would be provided by Way of the Cross.

50. Washoe's exceptions now appear to claim that it was somehow misled by the revision of FCC Form 301, and that it did not, in any event, have to "document" its financial qualifications. We affirm the ALJ in holding that Washoe's view of the law "is simply wrong" (I.D., para. 235). As we have explained, an applicant's financial qualifications are a *sine qua non* of licenseeship. 47 U.S.C. §308(b)(7); *see also In the Matter of Certification of Financial Qualifications by Applicants for Broadcast Station Construction Permits*, Public Notice, FCC 87-97, released March 19, 1987; *California Broadcasting Corp.*, 2 FCC Rcd 4175 (Rev. Bd. 1987). The Commission must be able to rely on an applicant's sworn representations as to its basic financial qualifications. Although the Commission now permits new applicants to simply "certify" that they possess the resources to meet the Commission's fundamental financial threshold, our substantive financial standard remains unaltered. *Revision of Form 301*, 50 RR 2d 381, 382 (1981). *See also Dutchess Communications Corp.*, 101 FCC 2d 243 (Rev. Bd. 1985); *Las Americas Communications Inc.*, 1 FCC Rcd 786 (Rev. Bd. 1986). An applicant's financial certification is of vital significance because, in dispensing with the requirement that applicants submit and describe their actual financial plans, the Commission has made paramount the absolute candor of applicants in this critical regard.

51. The Commission's current application form (FCC Form 301) requires every applicant to certify, *under penalty of perjury*, that "sufficient net liquid assets are on hand or are available from committed sources to construct and operate the requested facilities for three months without revenue." FCC Form 301, Section II. Each applicant must swear that, (a) "it has a reasonable assurance of a present firm intention for each agreement to furnish capital or purchase capital stock by parties to the application, each loan by banks, financial institutions or others, and each purchase of equipment on credit"; (b) "it can and will meet all contractural requirements as to collateral, guarantees, and capital investment"; and that (c) "it has determined that a reasonable assurance exists that all sources (excluding banks, financial institutions, and equipment manufacturers) have sufficient net liquid assets to meet these commitments." Any applicant who fails to make these certifications has not established its financial qualifications. *RKO General, Inc.*, 57 RR 2d 374 (1984). And, any applicant that certifies *falsely* is patently not qualified to be a federal licensee. *Las Americas Communications, supra.*

52. Thus, we affirm the ALJ's disqualification of Washoe for its patently false financial certification. While the testimony of Washoe's principals is riddled with contradictions and inconsistencies, the actual facts are quite clear. When Foulk certified that Washoe was financially qualified, neither she nor any other Washoe principal had obtained any reliable construction and operating cost estimates for the proposed television station; made any effort to confirm the availability of funds on which Washoe could rely; or secured any written documentation that such funds would be made available. Washoe compounded its initial false certification by supplying inconsistent and misleading testimony at hearing in a deliberate attempt to obscure the truth from the Commission. Its actions reflect callous disregard for the integrity of the Commission's processes, and it is therefore disqualified absolutely. *California Broadcasting Corp., supra; Las Americas Communications, supra.* [4]

VIII. CONCLUSIONS

53. Because there is a significant and dispositive disparity between the signal coverage areas of the instant applicants, the result here turns upon further consideration of the best comparative proposal that will otherwise provide *first television service* to the greatest number of persons. *See Sixth Report and Order on Television Allocation*, 41 FCC 148, 167 (1952). The only two applicants who will provide such a first service to a significant area are NTC and RET. Since NTC has been awarded a 35% quantitative integration factor, enhanced by other cognizable attributes, versus RET's 0% integration credit, NTC is the preferred applicant. Further, the coverage preference awarded NTC clearly outweighs the 85% full-time and, at best, the 15% part-time integration credit (and related qualitative enhancements) accruing to RMBC. *RAM Enterprises, supra.* As to the remaining applicants, Page receives, at most, 20% integration credit, RCBC a 0% integration credit, and Washoe is disqualified absolutely.

54. ACCORDINGLY, IT IS ORDERED, That RMBC's Motion for Acceptance of Late-Filed Exceptions dated October 20, 1987, IS GRANTED and its Exceptions ACCEPTED; and RET's Petition for Leave to Amend, dated April 5, 1988 IS GRANTED, and the amendment ACCEPTED; and,

55. IT IS FURTHER ORDERED That the applications of Washoe Shoshone Broadcasting, a Limited Partnership (File No. BPCT-850328KE); Reno-Eleven Telecasters (File No. BPCT-850509KH); Reno Minority Broadcasting Corporation (File No. BPCT-850509KJ); Page Enterprises, Inc. (BMPCT-850509KQ); and Reno Community Broadcasting

Co., a Nevada Limited Partnership (File No. BPCT-850509KS) ARE DENIED, and the application of Nevada Television Corporation for a new VHF television Station on Channel 11 at Reno, Nevada IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Eric T. Esbensen
Member, Review Board

FOOTNOTES

[1] Some of the exceptors attempt to rely on the testimony of William C. Andrews, President of Page (one of the applicants herein) to demonstrate that a signal from NTC's proposed Channel 11 cannot provide service to Susanville, California. But, Andrews' self-serving comments cannot be credited since, *inter alia*, Andrews is not an engineer, nor is there evidence to show how his "determinations" were made; and there is no showing as to the type of facility (antenna height, location/tower site, power, coverage pattern, and the like) utilized on which to base his statements (Tr. 1806). Hence, the ALJ properly struck Andrews' response pertaining to coverage in Susanville (Tr. 1807).

[2] "Technote 101" studies have been found acceptable under certain circumstances. For example, in *Liberty Television*, 18 FCC 2d 924 (Rev. Bd. 1969) a showing pursuant to Section 7 of Volume 1 of "Technote 101," *utilizing 12 radials dispersed over four quadrants*, was determined to be appropriate to prove that there would be no prohibited overlap of television signals (proscribed by 47 CFR §73.636). However, the Commission has held more recently that "Technote 101" studies are not appropriate in the *low-power television service* "because there is no universally accepted method of predicting" terrain shielding. *Apogee Broadcasting* Corp., 100 FCC 2d 602, 604 (1985). The Commission there declared:

> "Further, even if we allowed terrain shielding considerations in this service, we would find that Apogee's engineering showing does not describe the specific model in NBS Technical Note 101 used to predict shadow losses, nor the underlying engineering assumptions in the model concerning signal path parameters. The showing also does not include a sufficient explanation of all numerical results of the analysis, nor does it define the coded notations that appear on the computerized output. Second, Apogee has not shown that its analysis of a single propagation path would adequately demonstrate noninterference due to terrain shielding."

[3] We have awarded NTC at most a 35% quantitative integration credit rather than zero based on the factors outlined in *Wodlinger, supra*. Here, the applicant is not a "sham"; all of its parties are clearly identified and neither Walther nor Mack misrepresented their roles with the applicant; there has been no comparative upgrading; and the remaining three voting stockholders will actively participate in the day-to-day operation of the station.

[4] The ALJ found, with respect to Issue (a), that Washoe is now "financially qualified." However, that is irrelevant, and in light of Washoe's disqualification on other grounds, we need not reach the exceptions pertaining to that issue.

CONCURRING STATEMENT OF BOARD
CHAIRMAN JOSEPH A. MARINO

While concurring in the Board's Decision that NTC is comparatively superior over the other competing applicants, I would not attribute Steven Walther's equity interest to NTC under the "integration" criterion (see para. 18 above) merely because he provided legal services to the applicant. Neither the ALJ nor the majority found that any record evidence demonstrated that counsel would, in fact, have any control or influence over the day-to-day operations of the station. Rather, the *Decision* found that it was estopped by the Commission's *Clarification on Ownership Attribution*, 1 FCC Rcd 802, 804 (1986) from considering NTC's Walther to be a "passive" principal. *See Mark L. Wodlinger*, FCC 88R-29, adopted May 12, 1988, paragraph 9 and n. 4 (until guidance from Commission available, "limited partner" or "non-voting" shareholder ownership interests of attorneys who perform legal services for applicant will be conclusively regarded as "active" principals for purposes of comparative analysis).

In the *Ownership Attribution* clarification (at 804), the Commission declared that the "equity interest of limited partners who provide legal representation and counsel to the partnership is attributable" for comparative purposes to the applicant. Notwithstanding this abstract pronouncement, however, the Commission subsequently awarded an applicant in *Victory Media, Inc.*, FCC 88-134 released April 12, 1988 100% quantitative "integration" credit even though the applicant's two non-voting shareholders performed many services, including serving as initial counsel of record, for the applicant. There appears to be some inconsistency in the clarification order and *Victory*. *Victory* is the latest Commission pronouncement on this subject. In that concrete case the Commission concluded (at paragraph 18) that mere involvement, including providing legal services, by nov-voting shareholders attorneys in the *formation* and *initial prosecution* of the aplication is, in the absence of evidence showing that such "passive" investors will, in fact, have control or influence over the day-to-day operation of the station, insufficient of warrant attribution of their equity interests to the applicant.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 88-105

In the Matter of

AT&T Communications Transmittal No. 1046
Tariff F.C.C. No. 1

Hospitality Network Service

ORDER

Adopted: June 15, 1988; Released: June 23, 1988

By the Chief, Common Carrier Bureau:

1. On March 2, 1988, the Bureau released an Order designating issues for investigation of a tariff filed by AT&T Communications (AT&T) proposing to introduce Hospitality Network Service (HNS).[1] We directed AT&T to demonstrate in its direct case why the "tie-in" of "1+" and "0+" services in the proposed HNS offering did not constitute an unreasonable practice in violation of Section 201(b) of the Communications Act. In addition, AT&T was also directed to respond in its direct case to specific questions relating to rebates and the requirements of Section 203(c) of the Act.

2. AT&T filed its direct case on March 22, 1988. American Operator Services, Inc., the Bell Atlantic Telephone Companies, International Telecharge, Inc., MCI Telecommunications Corporation, Puerto Rico Telephone Company, Telesphere International, Inc., and US Sprint filed oppositions on April 6, 1988. AT&T filed a reply on April 13, 1988.

3. By Transmittal No. 1196, filed April 22, 1988, AT&T withdrew its Transmittal No. 1046. Transmittal No. 1046 having been withdrawn by the applicant, we conclude that the Bureau's investigation of that transmittal is moot.

4. Accordingly, IT IS ORDERED that the investigation of AT&T Communications, Tariff F.C.C. No. 1, Transmittal No. 1046, CC Docket No. 88-105, IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] AT&T Communications, 3 FCC Rcd 1465 (1988) (*March 2 Order*).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Application of

ELLIS THOMPSON — File No. 14261-CL-P-134-A -86

For Authorization to Construct
and Operate a Domestic Public
Cellular Radio Telecommunications
System on Frequency Block A In
Atlantic City, New Jersey MSA

MEMORANDUM OPINION AND ORDER

Adopted June 15, 1988; Released: June 24, 1988

By the Chief, Mobile Services Division:

1. The Ellis Thompson (Thompson) application was selected first in the lottery held on April 21, 1986, for the Atlantic City, New Jersey MSA. *See* Public Notice No. Cl-86-193 (released June 13, 1986). Thompson had entered into a pre-lottery settlement agreement with 143 other applicants in the market. These minority interest holders have a 49.9% share of the application while Thompson has a 50.1% share. Petitions to Deny were filed by Roam-Tel Communications of Evansville (Roam-Tel), and RJR Communications, Inc. (RJR) and F&F Communications (F&F) (petitioners), who filed a joint petition. Thompson opposed the petitions. While the petitions were pending, American Cellular Network Corporation (Amcell) filed a request for a Section 403 inquiry.[1] Amcell alleges that 25 of the applications in the Atlantic City settlement group are fraudulent applications and are possibly part of a wide-scale scheme involving a number of markets. As discussed below, we will deny the petitions to deny, grant the application with certain conditions and deny Amcell's request for a Section 403 inquiry.

PETITIONS TO DENY

2. RJR and F&F claim that Thompson does not have a firm financial commitment from its lending source, Telephone and Data Systems, Inc. (TDS) because there was no consideration given from Thompson to TDS to obtain the loan. Furthermore, the petitioners argue that TDS' balance sheet is outdated and shows that TDS has insufficient assets to finance the loan.

3. In response, Thompson maintains that he has a firm commitment from TDS and TDS is able to fulfill this obligation. The consideration for the loan is that Thompson agreed to pay TDS 7.5% of the monthly gross revenues of the system and in return TDS will design, construct, operate, and finance it. Furthermore, Thompson asserts that although TDS has sufficient funds available for the system, TDS obtained a loan commitment from the First National Bank of Minneapolis as an additional source of funds. Finally, Thompson disputes the petitioners' claim that Section 22.917(b)(1) of the rules requires that the applicant's, not the lending institution's, balance sheet must be 30 days old. Thompson maintains that he met this condition. Also, Thompson points out that a letter from the Treasurer of TDS states that the balance sheet was still current when it was included with the application.

4. We find Thompson to be financially qualified. Thompson has demonstrated that he has a firm commitment from TDS to finance the system. Furthermore, while TDS has shown that it has sufficient funds for this purpose, it has taken the added precaution of obtaining a loan commitment from the First National Bank of Minneapolis for the full amount of money needed to construct the system. Moreover, under Section 22.917(b)(1) of the Commission's rules only the applicant's balance sheet and not that of the lendor must be current within 30 days of submission to the Commission.[2]

5. Roam-Tel contends that Thompson's application fails to meet the Commission's "letter perfect" standard because it contains a number of engineering defects. Roam-Tel argues that Thompson proposes the use of a Phelps Dodge 1136 antenna in Cell One with a maximum gain of 11.5 decibels and a beam width of 150 degrees. According to Roam-Tel, these specications exceed the capability of the Phelps Dodge 1136 and concludes that Thompson's system cannot be built as outlined in his application. In addition, Roam-Tel argues that Thompson calculated the antenna gains and contours incorrectly for Cell One by not directing maximum antenna gain at 0 degrees, as provided for in the application. Furthermore, Roam-Tel maintains that Thompson used obsolete emission designators in each of its cells in response to questions asked on FCC Form 401.

6. In response to these allegations, Thompson states that study of the actual engineering shows that 10.5 was used for the calculations and that it is obvious from the applicant's Form 401 that the use of 11.5 was a typographical error. Thompson then claims that his use of 150 degrees as the beam width for the Phelps Dodge antenna responds directly to item 33(h) and the Commission's instructions for Form 401 which require that the answer given relate to "the half power point according to the solar diagram." As for the use of outdated emission designators, Thompson claims the correct figures appear in his engineering amendments and regardless, the difference in the numbers does not affect the performance of the system.

7. The amendment described in note two, *supra*, also contains a number of changes to Thompson's engineering proposal. In his amendment, Thompson explains that after consulting with engineers, he decided to change three of the four proposed cell sites. He contends that since the change in cell sites will not enlarge the CGSA, the amendment is minor, pursuant to Section 22.918(b) of the Rules. Thompson's amendment also re-engineers the fourth cell site as a result of a change in the type of antenna to be used.

8. All the petitioners argue that Thompson's amendment should not be accepted because it proposes significant changes to his original Section 1.65 amendment and is actually a major amendment under Section 22.23(c)(1) of the rules. Furthermore, the petitioners claim that an application which is modified by a major amendment is a newly filed application. *See* , Section 22.23(g) of the Rules. Since the time for filing applications for the Atlantic City

market has passed, the petitioners maintain that Thompson's "newly filed application" is unacceptable and should be returned as defective.

9. It is well established that the letter-perfect standard applies only to certain specified pre-lottery filing requirements. *Johnstown Cellular Communications Co.*, 1 FCC Rcd 1164 (1986). The relevant rule governing applications at the tentative selectee stage is Section 22.20 of the Commission's rules, which requires dismissal of defective applications, *i. e.*, those which are not acceptable for filing. However, if an application has been found to be acceptable for filing, minor errors may be corrected. *See , e. g., James K. Larrington Corporation*, 2 FCC Rcd 1529 (1987); *Werner, Burton K.*, 2 FCC Rcd 1484 (1987); *Timothy Roper*, 2 FCC Rcd 4458 (1987). An application is defective if it lacks complete answers to questions, informational showings, execution, or other matters of a formal character, *See* Section 22.20(a)(1)). Accordingly, if the application contains information that is generally complete but contains errors, the application is not defective. As for the specific allegations concerning the engineering aspects of the application, we find Thompson's explanations satisfactory. Finally, the amendment containing engineering changes qualifies as a minor amendment pursuant to Sections 22.23(c) and 22.918(b) of the rules and we accept it. Therefore, we conclude that Thompson is technically qualified to be a Commission licensee.

PETITION FOR SECTION 403 INQUIRY

10. After Thompson won the lottery, he filed an amendment reflecting a change in the ownership of the station. The amendment stated that Thompson had entered into a pre-lottery settlement agreement with 143 other applicants in the market. The settlement agreement was sponsored by Cellular Management Services (CMS). Under the terms of the agreement, Thompson, as the successful applicant, retained a 50.1% interest in the license with the other 143 parties sharing the remaining 49.9%.

11. Amcell claims that in the process of purchasing a number of minority interests in the Atlantic City station it uncovered a fraudulent application scheme. Amcell filed a Petition requesting the Commission to commence a Section 403 Inquiry to investigate these claims. In its petition, Amcell explains that James C. Hadsell (Hadsell), represented that he had either a proprietary interest in or the power of attorney over 25 of the applications. Amcell was interested in purchasing 22 of these applications. Amcell claims that in the course of its dealings with Hadsell, it acquired a number of documents which indicate that Hadsell had no authority to sell any of the applications. Amcell also maintains that some of the parties involved in this purported scheme are involved in similar schemes in fourteen other markets.

12. In response to the petition, Thompson asserts that he had no knowledge of any fraudulent activities on the part of the 25 minority interest holders. While he states that he has no objection to the Commission investigating the validity of the claims made by Amcell, he requests that the investigation not delay action on his pending application. Thompson argues that the disqualification of minority owners of a license does not automatically disqualify all owners, citing *Fresno Cellular Telephone Company*, Mimeo No. 2842 (released February 28, 1985). [3]

13. We have not been presented with any evidence that Thompson is unqualified to be a licensee. The alleged misconduct of some members of the CMS settlement group is insufficient to raise a material issue against Thompson. We agree with Thompson that the disqualification of some members of a cellular settlement partnership does not automatically preclude other members from qualification. *See Fresno Cellular Telephone, supra.* Moreover, we do not believe that the public interest would be served by a Section 403 inquiry. The questionable applications have been removed from the settlement group and are no longer partners in the Ellis application.[4]

14. Furthermore, we believe that the contractual disputes between CMS and members of the settlement group are not matters to be resolved in this forum. As the Commission has stated previously, it will not attempt to interpret or enforce the settlement agreements of cellular applicants. *See American Cellular Network Corp. of Nevada*, Mimeo No. 6198, released August 6, 1986, *Answer of Houston*, Mimeo No. 4362, released May 8, 1986 and Guidelines for Settlements an Changes in Ownership of Cellular Systems, Report No. CL-86-99, released March 24, 1986.[5]

PETITION FOR CONDITIONAL GRANT

15. After submitting its request for a Section 403 inquiry, Amcell filed a Petition for Conditional Grant. Amcell explains that Thompson and TDS amended their Option Agreement to provide (in paragraph 16) that TDS' subsidiary, USCC, has the authority to abrogate any contract Thompson enters into for the provision of goods or services costing50,000 or more. Amcell contends that the provision gives TDS control over Thompson's system and thus violates Section 310(d) of the Act and Section 22.23(a)(4) of the rules. Amcell maintains that under prevailing Commission policy neither the consent or cancellation provisions of paragraph 16 may be exercised by TDS without unreasonably interfering in Thompson's day-to-day control over his application.

16. USCC and TDS filed a joint opposition to Amcell's petition. They argue that the agreement between TDS and Thompson is a private contractual matter which is not subject to FCC jurisdiction. Nonetheless, they argue that the contract complies with Commission policy in that while it does impose an ultimate restriction on certain of Mr. Thompson's decisions, it will not deprive him of day-to-day control over the system. TDS maintains that the filing of the petition is just another means of delaying action on Thompson's application.[6]

17. Thompson, in his response to the petition, stated that he has no intent to transfer control of the station and, in fact, has not relinquished control of the system. Thompson states he has actively pursued alternatives for the construction and design of the system and has entered into a Construction, Switching and Maintenance Agreement with Amcell. However, to eliminate any ambiguity as to his control, and to expedite action on his application, Thompson has offered to delete paragraph 16 of the Option Agreement he has with TDS.[7]

18. When a tentative selectee enters into an arrangement to obtain services from another company to finance, design, construct, operate and manage the proposed cellular system, the Commission is concerned that a tentative selectee may divest itself of substantial responsibility and control of its proposed facility in violation of Section 310

of the Communications Act of 1934. The MSD issued a public notice offering guidance in this area which is intended to ensure that a Commission licensee has control of and responsibility for its facility at all times. Common Carrier Public Mobile Services Information, Report No. CL-87-1. In this case there is no evidence that Thompson has relinquished control of the proposed cellular operations. Thompson has indicated his independence by entering into an agreement with Amcell which TDS opposes. However, we believe that paragraph 16 of Thompson's agreement with TDS does allow TDS to interfere unreasonably with the tentative selectee's business decisions. Thompson must be permitted to exercise business judgments regarding the proposed cellular system free from such interference. Thus, Thompson's application is granted conditioned on removal of paragraph 16 from the TDS/Thompson Option Agreement.

ORDERING CLAUSES

19. Accordingly, for the foregoing reasons, IT IS HEREBY ORDERED, That the joint petition to deny filed by Roam-Tel Communications of Evansville, RJR Communications, Inc., and F&F Communications IS DENIED.

20. IT IS FURTHER ORDERED, That the petition for Section 403 inquiry filed by American Cellular Network Corporation IS DENIED.

21. IT IS FURTHER ORDERED That the Petition for Conditional Grant filed by American Cellular Network Corporation IS GRANTED TO THE EXTENT INDICATED HEREIN.

22. IT IS FURTHER ORDERED That, the application of Ellis Thompson, File No. 14261-CL-P-134-A-86, IS GRANTED ON CONDITION That paragraph 16 of the TDS/Thompson agreement in question here is removed. The application grant is effective on the release date of this order. Construction is not authorized at any location for which a final Federal Aviation Administration determination has not been submitted to the FCC and any required marking and lighting specifications have not been issued by the FCC.

23. IT IS FURTHER ORDERED, That all other nonwireline applications in this market ARE HEREBY DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Kevin Kelley
Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTES

[1] Section 403 of the Communications Act provides in pertinent part: "The Commission shall have full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter. . . under any provision of this Act. . . ."

[2] Thompson filed a Section 1.65 amendment stating that he had entered into an Option Agreement with a subsidiary of TDS (United States Cellular Corporation (USCC)), giving USCC an option to purchase Thompson's majority interest in the system and retaining USCC to "design, finance construct and operate the System." The three petitioners objected and alleged that Thompson was not the real party in interest. Thompson has since terminated that part of the contract allowing USCC to design, finance construct and operate the cellular system and thus the issue is moot.

[3] F&F also filed a pleading in response to Amcell's petition in the form of a supplement to its petition to deny. There, it argued that based on the assumption that Hadsell has more than a one percent ownership interest in more than one application in this market, all the applications in the market are defective and must be dismissed. In addition, F&F claims that despite the fact that Thompson is an innocent bystander to the alleged fraudulent licensing scheme, his application must also be dismissed, citing *California Broadcasting Corporation*, 2 FCC Rcd 4175 (1987).

[4] On November 18, 1987, counsel for Thompson advised the Commission that CMS wrote to the 25 suspect owners and informed them that they have been excluded from further participation in the Atlantic City settlement because they violated the prohibition in the agreement against joining more than one settlement group.

[5] A number of the filers of the suspect applications have written to the Commission to explain their role in the application process. For example, Daniel Morrison advised the Commission that he had no knowledge of the application that was signed on his behalf by Hadsell. He asks the Commission to remove his name from the list of persons associated with the Thompson application. Marvin Douglas Cook, Ronald McDonald and Nancy Larsen Prevost submitted affidavits detailing their involvement in the application, requesting that their applications be found free of defects. All of these applicants have been excluded from the CMS settlement group. However, the Mobile Services Division is currently examining this matter to determine if any further action is appropriate.

[6] TDS is convinced that Amcell's motive in acquiring interests in this market is to obtain a sufficient number of votes to veto any attempt by Thompson to transfer his interest to TDS pursuant to the Option Agreement.

[7] On February 2, 1988, TDS and USCC filed suit against Amcell alleging that Amcell has tortious interfered with the plaintiffs' contract with Thompson.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-266

In the Matter of

Amendment of Section 73.202(b), RM-6069
Table of Allotments,
FM Broadcast Stations.
(Grundy Center, Iowa)

NOTICE OF PROPOSED RULE MAKING AND ORDER TO SHOW CAUSE

Adopted: May 11, 1988; Released: June 23, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making filed by Stoner Broadcasting System, Inc. (petitioner), licensee of Station KHAK-FM, Channel 251, Cedar Rapids, Iowa. Petitioner requests the substitution of Channel 241A for Channel 249A at Grundy Center, Iowa, and the modification of the license of Grundy Broadcasting Company for Station KGCI(FM) to specify the new Class A frequency. Comments in opposition to the petition were filed by Grundy Broadcasting Company (Grundy) to which the petitioner filed a reply.

2. Petitioner states that the substitution of channels would eliminate a short-spacing problem between its Cedar Rapids station and the Grundy Center station. Petitioner states that it submitted an application for a construction permit (BPH-861202MA) seeking to change Station KHAK-FM's transmitter site and increase tower height so as to preserve its Class C status. Due to "unavoidable difficulties," petitioner says it proposed a site which is 3.6 miles short-spaced to the present licensed site of Station KGCI(FM). Petitioner contends that this short-spacing has been compounded by the Commission's grant of Station KGCI(FM)'s application (BPH-861010IA) to increase the station's facilities and relocate its transmitter to a site 6.5 miles northeast of Gundy Center in that petitioner's proposed transmitter site for Station KHAK-FM would now be short-spaced by 10 miles to Station KGCI(FM)'s new site.[1] However, it states that this short-spacing can be eliminated if the license of Station KGCI(FM) is modified to specify Channel 241A. Petitioner provides an engineering study showing that Channel 241A can be allocated to Grundy Center in compliance with the Commission's minimum distance separation requirements and can be used at Station KGCI(FM)'s present licensed site as well as the site specified in its construction permit.[2] Therefore, it requests that the Commission issue an *Order to Show Cause* proposing the substitution of channels at Grundy Center and the modification of Station KGCI(FM)'s license. As precedent, it cites *Menominee, Michigan*, MM Docket 86-20, 51 FR 4195, February 3, 1986, where the Commission proposed to substitute channels at Menominee, Michigan, and modify an existing station's license accordingly, in order to accommodate the application of an Appleton, Michigan, station which had filed an application to relocate its transmitter to a site which would permit retention of its Class C designation.

3. Grundy opposes both the petitioner's request for rule making and its pending application. It states that the pending application of Station KHAK-FM specifies a site identified as the "Lefebure site". However, use of this site requires a waiver of the minimum distance separation requirements since the Lefebure site is 5.9 kilometers short-spaced to Station KGCI(FM)'s licensed facilities and 16.10 kilometers short-spaced to the transmitter site proposed in its pending application. In addition, petitioner must also obtain a waiver of the Commission's duopoly rules since there would be prohibited overlap of the 1.0 mV/m contours of Station KHAK and co-owned Station KGGO- FM, Des Moines, Iowa, according to Grundy.

4. As to the rule making request, Grundy contends that the petitioner seeks "extraordinary regulatory relief" (the modification of Station KGCI(FM)'s license to Channel 241A) for the sole purpose of providing itself with greater flexibility in selecting a site so as to permit retention of Station KHAK-FM's Class C status. However, it argues that before such relief can be considered by the Commission, petitioner must show that there is no less onerous method by which Station KHAK-FM can achieve its goal and that its present service is inadequate. Therefore, Grundy submits that petitioner's request is premature and does not warrant consideration by the Commission.

5. Grundy also argues that *Menominee, Michigan, supra*, is not on point in that, unlike here, the petitioner sought to locate its tower in the vicinity of four tall television towers and the affected licensee agreed to change its channel of operation. Grundy states that Section 316 of the Communications Act of 1934, as amended, gives the Commission authority to modify a station's license under "certain very limited circumstances." It contends that such modifications are not easily obtained and that the Commission has long held that the burden is on the petitioner to demonstrate that a modification would be in the public interest, citing *KTAR Broadcasting*, 4 RR 119, 121 (1948); *Democrat Printing Co.* v. *FCC*, 7 RR 2138 (1952); *Miners Broadcasting Service, Inc.*, 13 RR 200, 202 (1955); and *Pillar of Fire*, 6 RR 1310, 1310a (1951). Grundy argues that the petitioner has failed to submit any showing that the public interest would be served by forcing Station KGCI to change frequencies.

6. In response, petitioner disputes Grundy's contention that the petition is premature and thus should be dismissed, stating that Grundy failed to explain why the request is premature. Petitioner argues that the existence of Station KHAK-FM's application requesting a transmitter site which is short- spaced to Station KGCI(FM) makes the petition "ripe," citing *Menominee, Michigan, supra.* Petitioner also disputes the assertion that Station KHAK-FM must demonstrate that the substitution of channels is the only means by which the short-spacing can be resolved and that Station KHAK-FM's present coverage is inadequate. Again, it states that Grundy has failed to cite any authority for the imposition of such a burden on the petitioner, arguing that it need only show that the public interest would be served by the substitution of channels. Citing *Edens Broadcasting*, 62 R.R. 2d 599 (1987), petitioner states that the Commission has recognized that the public interest is served where a licensee upgrades its

facilities to serve more people and to preserve its full Class C status. Petitioner also contends that Grundy's arguments that *Menominee, Michigan, supra,* is distinguishable from this request are unpersuasive. It states the fact that the petitioner sought the substitution of channels so it could relocate its antenna to a site used by other tall towers and the willingness of the Menominee station to the change in channel are decisionally irrelevant. It states that Grundy appears to believe that channel changes can only be accomplished with the consent of the affected licensee. However, it contends that this is not so. It concludes that Grundy has not brought forth any public interest reason why its channel should not be changed beyond the mere fact that it does not want to change its channel of operation.

7. We believe the public interest would be served by proposing the substitution of Channel 241A for Channel 249A at Grundy Center since it could permit Station KHAK-FM to increase its facilities and retain its Class C status. We do not believe that petitioner's request is either premature or repetitive. Grundy contends that the petitioner must first pursue its application and request for waiver of the Commission minimum distance separation and duopoly rules. However, as evidenced by *Menominee, Michigan, supra,* that is not the case. While a ruling on the acceptability of petitioner's application is not appropriate in this proceeding, we note that should Station KGCI(FM) be modified to Channel 241A, petitioner would no longer need to seek a waiver of the Commission's minimum distance separation requirements. In addition, we have determined that the amount of the 1 mV/m contour overlap (1-1/2%) between Station KHAK-FM and co-owned Station KGGO-FM is within the bounds which the Commission will consider for waiver. [3] Likewise, we are not aware of any requirement, and Grundy has provided no such precedent, where the Commission required a petitioner to demonstrate that no means exist by which a station may be upgraded other than by the substitution of channels and modification of a third party's license. *See* , *Jefferson City and Vandalia, Missouri,* 2 FCC Rcd 4741 (1987) and *Etowah and Jamestown, Tennessee,* 2 FCC Rcd 6387 (1987). Moreover, because the contemplated modification of Grundy's license only involves a change in frequency, and no change in transmitter site, the burden on Grundy is of a small magnitude. Finally, there is an inherent public interest benefit in the upgrading of stations to the maximum extent possible because upgrades permit service to a greater number of people. As stated in *FM Allocation Rules of Part 73, Subpart B, FM Broadcast Stations* :

> ". . .Commission policy is to encourage its broadcast licensees to upgrade their facilities in order to provide enhanced service to the public. This policy is reflected in such recent actions as the provision for daytime-only AM enhanced credits in Docket 84-231, the provision for adjacent and co-channel upgrades in Docket 85-313, and the provision for FM channel upgrades where additional equivalent channels are available to accommodate other interested parties in Docket No. 83-1148."

2 FCC Rcd 660 (1987) (footnotes omitted)

8. Channel 241A can be allocated to Grundy Center in compliance with the Commission's minimum distance separation requirements and can be used at the sites specified in Station KGCI(FM)'s license and construction permit. However, we note that petitioner has failed to state an intention to reimburse Grundy Broadcasting Company for the reasonable costs associated with the change in its frequency. *See* , *Chatom, Alabama,* 51 Fed. Reg. 16322, May 2, 1986, and cases cited therein. Therefore, petitioner is requested to do so in comments herein.

9. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Grundy Center, Iowa	249A	241A

10. Accordingly, IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, Grundy Broadcasting Company, licensee of Station KGCI(FM), Grundy Center, Iowa, SHALL SHOW CAUSE why its license SHOULD NOT BE MODIFIED to specify operation on Channel 241A as proposed herein instead of the present Channel 249A.

11. Pursuant to Section 1.87 of the Commission's Rules, Grundy Broadcasting Company may, not later than **August 15, 1988,** file a written statement showing with particularity why its license should not be modified as proposed in the *Order to Show Cause*. The Commission may call on Grundy Broadcasting Company to furnish additional information. If Grundy Broadcasting Company raises a substantial and material question of fact, a hearing may be required to resolve such a question pursuant to Section 1.87. Upon review of the statements and/or additional information furnished, the Commission may grant the modification, deny the modification, or set the matter of modification for hearing. If no written statement is filed by the date refered to above, Grundy Broadcasting Company will be deemed to have consented to the modification as proposed in the *Order to Show Cause* and a final *Order* will be issued by the Commission, if the abovementioned channel modification is ultimately found to be in the public interest.

12. IT IS FURTHER ORDERED, That the Secretary SHALL SEND, BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, a copy of this *Notice of Proposed Rule Making and Order to Show Cause* to: Grundy Broadcasting Company, 804 First Street, Grundy Center, Iowa 50638.

13. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

14. Interested parties may file comments on or before **August 15, 1988,** and reply comments on or before **August 30, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Joseph D. Sullivan, Esq.
Latham & Watkins

1333 New Hampshire Avenue, N.W.
Suite 1200
Washington, D.C. 20036
(Counsel to petitioner)

15. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See , Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

16. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] On August 14, 1987, the Commission rescinded its grant of Station KGCI(FM)'s application.

[2] The coordinates for Station KGCI(FM)'s licensed site are North Latitude 42-21-12 and West Longitude 92-53-04. The coordinates for Station KGCI(FM) at its applied for site are North Latitude 42-25-35 and West Longitude 92-41-22.

[3] Our action is not intended to prejudge the merits of any required waiver. If petitioner is unable to obtain a waiver, we will entertain requests for appropriate additional actions, if any, at that time.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-395

In the Matter of

Amendment of Section 73.202(b),	RM-5962
Table of Allotments,	RM-6194
FM Broadcast Stations.	
(Brownsville, Newport, Oakridge, and Reedsport, Oregon)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: May 17, 1988; Released: June 24, 1988

By the Deputy Chief, Policy and Rules Division:

1. At the request of P-N-P Broadcasting, Inc. (petitioner), the Commission has before it the *Notice of Proposed Rule Making and Order to Show Cause*, 2 FCC Rcd 5937 (1987), proposing the allotment of Channel 272A to Brownsville, Oregon, as the community's first local FM service. The *Notice* also proposed the substitution of Channel 274C1 for Channel 273C1 at Newport, Oregon, and the modification of Station KYQT's license to specify operation on the substitute channel. Petitioner filed comments supporting the allotment and Central Coast Broadcasting Company, Inc. (Central Coast), licensee of Station KYQT, filed comments opposing the modification of its license. In addition, School District 4J, Lane County, Oregon (School District), licensee of noncommercial educational Station KRVM, Channel 220A, Eugene, Oregon, filed comments and a counterproposal.[2] School District supports the substitution of channels at Newport but opposes the allotment of Channel 272A to Brownsville. Instead, it requests the substitution of Channel 272C1 for Channel 221A at Oakridge, Oregon, and the substitution of Channel 277A for Channel 221A at Reedsport, Oregon, so that it can relocate its transmitter and increase Station KRVM's facilities to Class C1. Petitioner filed an opposition to School District's counterproposal and to the opposition of Central Coast. Reply comments were filed by School District and Nanette Markunas (Markunas), applicant for Channel 221A at Oakridge and permittee of Station KSYD, Channel 221A, Reedsport, Oregon. Petitioner filed a response to the reply comments of School District. [3]

2. School District opposes the allotment of Channel 272A to Brownsville since it would not permit the relocation of Station KRVM's transmitter to the Blanton Heights antenna farm, which it states is used by the majority of FM stations that serve the greater Eugene market, and the upgrade of its facilities from Class A to Class C1. According to School District, the relocation of Station KRVM's transmitter and increase in facilities is now precluded by the Channel 221A allotments at Oakridge and Reedsport. Therefore, in addition to the denial of petitioner's proposal, School District requests the substitution of Channel 272C1 for Channel 221A at Oakridge and the modification of Markunas' pending application (BPH-860612MA) to specify the higher powered channel, the substitution of Channel 277A for Channel 221A at Reedsport, Oregon, and the modification of Markunas' construction permit for Station KSYD accordingly, and the substitution of Channel 274C1 for Channel 273C1 at Newport, Oregon, and modification of Station KYQT's license as proposed in the *Notice*. School District contends that the channel substitutions can be accomplished in compliance with the Commission's minimum distance separation and other technical requirements. Specifically, it states that Channel 272C1 can be allotted to Oakridge with a site restriction of 25 kilometers southwest and that there are sites available which would permit the station to provide a 70 dBu contour over all of the community. Additionally, it submits that the allotment of Channel 272C1 at Oakridge, unlike Channel 272A at Brownsville, would provide a first fulltime aural service to an area of 2368 square kilometers with a population of 3,860 persons, based on 1980 U.S. Census figures and uniform population distribution within minor civil divisions. Channel 277A can be allotted to Reedsport and can be used at the site specified in Markunas' construction permit and Channel 274C1 can be substituted for Channel 273C1 at Newport, as proposed in the *Notice* herein. School District states that it will reimburse Central Coast and Markunas for the reasonable expenses incurred as a result of the channel changes.

3. Central Coast opposes the modification of its license for Station KYQT. It states that Station KYQT has a significant audience in the area where Brownsville is located and is concerned that much of this audience may be lost if a station only 2 channels removed is allotted to Brownsville. Central Coast also is concerned over its being reimbursed for the costs associated with the change in channel. It notes that petitioner's commitment is conditioned upon becoming the permittee and Central Coast believes that problems may arise if another party is ultimately awarded the construction permit. This concern is heightened, according to Central Coast, based on its belief that Brownsville is too small and lacks an adequate business base to support a radio station. It states that it has been informed that Brownsville has so few businesses that it does not have a local Chamber of Commerce. Central Coast also argues that no reliance should be placed on the fact that Brownsville's county has a population of 90,200. It states that the approximately 23,000 persons residing outside Corvallis and Albany are spread over 2,200 square miles and that much of this area is beyond the service range of a Brownsville Class A station. Finally, if the channel is allotted as proposed, Central Coast requests that a hearing be held to determine if Station KYQT should be required to change channels and/or how the Commission will assure reimbursement for the channel change.

4. Petitioner reiterates its support for the allotment of Channel 272A to Brownsville and its intention to reimburse Central Coast for the costs involved in the change of channel. In response to the counterproposal, petitioner alleges that it contains several flaws. It states that a Channel 272C1 station at Oakridge would not be able to provide an unobstructed line-of- sight service to the community. According to petitioner, Oakridge is located in a valley of the Cascade Mountains at an elevation of

1200 feet above mean sea level (AMSL). The elevation of the site proposed by School District, which petitioner identifies as Fairview Peak, is 1817 meters AMSL. School District proposes an antenna height of 1847 meters AMSL (877 meters AHAAT) with an ERP of 6.41 kilowatts. Petitioner states that that a profile graph of the 43^0 T radial extending from the proposed transmitter site through Oakridge shows that there is an obstruction of 900 feet in the line-of-sight path. This obstruction would thus cause severe degradation of the signal in violation of Section 73.315 of the Commission's Rules. It goes on to state that an examination of topographic maps of the area indicates the same would be true from other possible transmitter sites in the area. In addition, petitioner states that the amendment of Markunas' application to specify Channel 272C1 in lieu of Channel 221A would be considered a major change, thus, in effect, rendering the existing application void. It contends that the substitution of the Class C1 channel at Oakridge would require that a new filing window be opened for other expressions of interest since Markunas' application has not yet been granted. However, should the Commission grant an exception and allow Markunas to retain cut-off status, it questions the availability of power and accessibility of the site, especially during the winter.

5. Petitioner also questions School District's claim that the Oakridge proposal would provide a first fulltime aural service to 3860 persons. It states that the white area shown by School District is located within the Umpqua and Rogue River National Forest, an area which is extremely rugged and mountainous and thus largely uninhabited. Petitioner contends that examination of a map shows possibly two or three communities in the area, each with a population of less than 300 people, and each located at the base of a mountain which would block the reception of the Oakridge signal. Finally, petitioner contends that the proposed allotment of Channel 272C1 at Oakridge conflicts with the pending rule making proposal in MM Docket No. 88-28 to upgrade Station KWHD, Weed, California, from a Class A to Class C1 channel, and that the allotment of Channel 277A to Reedsport conflicts with the proposal in MM Docket 87-602 to upgrade Station KRSB, Roseburg, Oregon, to Channel 276C2.[4]

6. In response to Central Coast's opposition to the change in Station KYQT's frequency, petitioner states that Newport is separated from Brownsville by the Coastal Mountain Range. Thus, it contends that reception of Station KYQT is marginal at best in Brownsville. Further, it notes that the allotment of Channel 272A at Brownsville complies with the Commission's minimum distance separation requirements. However, petitioner believes that there will be little loss of reception, if any, of Station KYQT's signal since any receiver capable of receiving Station KYQT would also be capable of rejecting second adjacent channel interference from the Brownsville station. As to Central Coast's concern over reimbursement, petitioner states that the grant of the license would be conditioned upon reimbursement. However, the question of who will reimburse and their ability to do so can only be answered when the Commission selects a permittee for the channel, according to petitioner. Petitioner also disagrees with Central Coast as to the economic viability of a Brownsville station and the community's status for allotment purposes. It states that Brownsville, an incorporated community, with a mayor-council form of government, has a bank and other businesses. Further, Brownsville is listed in the 1980 U.S. Census. Finally, petitioner opposes Central Coast's request for a hearing before modification, stating that it has failed to raise a substantial and material question of fact or to demonstrate that it would be adversely affected by the proposed modification of its license.

7. Markunas supports the substitution of Channel 272C1 for Channel 221A at Oakridge. She states that there is no merit in petitioner's allegations as to feasibility of the Fairview Peak site as proposed by School District. She submits that her consultant has contacted the site owner and found that the site is used by a number of two-way users and is available for broadcast use. She anticipates no problem in extending the existing power lines to the actual site. Markunas also requests that petitioner's intentions be examined. She states that petitioner has two rule making proposals pending which request allotments at Banks, Oregon, and Vancouver, Washington. However, according to Markunas, these two allotments are mutually exclusive since there would be a one mile overlap of coverage areas. Finally, she states that the conflict with the Weed, California, rule making should not be a bar to grant of School District's counterproposal. According to Markunas, her consultant has contacted the licensee of Station KWHO-FM at Weed and believes that he might be amenable to a short-spacing agreement. Thus, she requests the substitution of Channel 272C1 for Channel 221A at Oakridge without "penalizing her existing standing as the apparent grantee."

8. School District, in reply comments, states that petitioner's opposition to the counterproposal is devoid of any supporting citations. It contends that under established Commission precedent, each of the matters raised are either irrelevant to resolution of the proceeding or are premised upon theories or procedures at variance with those utilized by the Commission in resolving rule making matters. It disputes the terrain showing of petitioner, stating that it is well settled that the Commission does not consider such data in allotment proceeding, citing *Woodstock and Broadway, Virginia*, 2 FCC Rcd 7064 (1987), and *Port Jervis, New Jersey, et al.*, 10 R.R. 2d 1777 (1967). In addition, School District states that petitioner has provided no support for the conclusion that no suitable site exists for Channel 272C1 at Oakridge. It also states that the impact on Markunas' application for the Oakridge allotment is irrelevant to the resolution of the proceeding but that its expeditious grant might eliminate the complication alluded to by petitioner. As to the dispute over the population receiving a first fulltime aural service, School District states that it employed the Commission's established procedure of utilizing U.S. Census data and assuming a uniform distribution of population within minor civil divisions. Thus, the figures it has provided are valid and should be credited. In conclusion, School District states that because the comment periods regarding the Weed, California, and Roseburg, Oregon, proposals are still open, any conflict between its counterproposal and these requests should not and does not warrant the rejection of its proposal.

DISCUSSION

9. After carefully reviewing the pleadings before us, we find that School District's counterproposal is fatally flawed in several respects. School District has not shown that Channel 272C1 can be allotted to Oakridge in compliance

with the Commission's technical requirements. Petitioner contends that a Channel 272C1 station at Oakridge could not provide the community with the required line-of-sight service stipulated in Section 73.315 of the Commission's Rules. To this end, it has provided a showing demonstrating that a 900 foot obstruction lies between the site selected by the counterproponent and the community and believes the same to be true from other possible transmitter sites in the area. School District argues that petitioner's terrain showing should be disregarded since the Commission does not look at such data at the rule making stage, citing *Woodstock and Broadway, Virginia, supra*. We find that School District has misinterpreted this decision and the Commission's policy in general concerning the relevance of terrain data at the rule making stage. In *Woodstock*, the Commission held that a petitioner could not use actual terrain, rather than the assumption of uniform terrain, to show compliance with the Commission's city-grade service requirements. However, showings based on actual terrain may be used to demonstrate that compliance with the Commission's technical requirements is not possible. As stated in *Pinckneyville, Illinois* :

> In making assignments, we require a reasonable assurance that a site meeting the applicable Commission requirements would be available. Ordinarily, there is no need to specify a particular site, it is only necessary to show that a suitable site area exists. However, in some instances, clarification may be necessary and an additional showing may be required before we can make the assignment.

41 R.R. 2d 69, 71 (1977). *See* also *Hatch and Las Cruces, New Mexico*, 50 FR 4217, January 30, 1985. School District has failed to provide any data to refute petitioner's showing. Rather, it merely states that consideration of such issues is inappropriate at this time. We find that the lack of any showing demonstrating that sites do exist which would permit the provision of an unobstructed 70 dBu signal to Oakridge, in light of petitioner's showing to the contrary, requires denial of School District's counterproposal. To do otherwise could result in the allotment of a substandard channel.

10. School District also requests the modification of Markunas' Oakridge application to specify the higher powered channel. Markunas has agreed to this change based on it not "penalizing her existing standing as the apparant grantee." Petitioner contends that the substitution of channels would require the opening of a new filing window. School District's response is that the impact on the procedural status of Markunas' application is irrelevant to the resolution of this proceeding. School District's assertion is incorrect. As has been stated before, where, as here, no party has been authorized to operate on the existing channel and a higher class channel is made available for the first time, a new filing window must be opened for the acceptance of new applications. Likewise, we will not substitute a higher class channel where, as here, an applicant opposes the opening of a new window. *See Lafayette, Louisiana*, 2 FCC Rcd 7303 (1987), and cases cited therein.

11. Further, while not of decisional significance, we also cannot accept School District's showing that the allotment of Channel 272C1 at Oakridge would provide a first full-time aural service. While School District used the correct method for determining population, its showing appears to take into account only the FM stations in the area. AM and FM are considered to be part of a single aural service. Therefore, showings of first and second aural service must take into account AM reception. *See Anamosa and Iowa City, Iowa*, 46 FCC 2d 520 (1974).

12. Finally, we find that Channel 277A cannot be allotted to Reedsport in compliance with the Commission's minimum distance separation requirements, contrary to School District's contention. Rather, this allotment conflicts with the proposed substitution of Channel 276C2 for Channel 276A at Roseburg, Oregon, and the modification of Station KRSB-FM's license accordingly, as proposed in MM Docket 87-602. While School District appears to have been aware of this proceeding, it did not file comments therein. Thus, the Commission has no basis upon which to comparatively consider the two proposals in order to decide whether the public interest would be better served by alloting Channel 276C2 to Roseburg or Channel 277A to Reedsport.

13. As to the opposition of Central Coast, we find that it has not presented a substantial and material question of fact which would warrant a hearing on the modification of its license for Station KYQT. Its opposition to the allotment is based partly on a belief that the allotment will result in Station KYQT losing a substantial portion of its audience in the Brownsville area, thus causing economic injury to its station. Prior to abolishing our policy in this area, the Commission long held that such issues were more properly raised at the application stage. *See Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88, 99 (1982), and *Policies Regarding Detrimental Effects of Proposed New Broadcast Stations on Existing Stations*, 3 FCC Rcd 638 (1988), recons. pending. Central Coast also alleges that there is insufficient business activity in Brownsville to warrant the allotment of a channel. However, this too is not relevant. There is no question as to the status of Brownsville as a community for allotment purposes. It is incorporated and listed in the 1980 U.S. Census as having a population of 1,261 persons. The fact that Brownsville may not have a local Chamber of Commerce or a particular level of business activity is insufficient reason to deny an allotment, especially in light of the dearth of information provided by Central Coast. Rather, we assume that a petitioner's statement of intent to apply for the channel is based, at least in part, on a determination that the station would be economically viable. Finally, we do not find that Central Coast's concerns over reimbursement warrant a hearing. It is well established Commission policy that where a new allotment requires an existing station to change its channel of operation, the affected station is entitled to reimbursement for the reasonable costs associated with the channel change. *See Circleville and Columbus, Ohio*, 9 R.R. 2d 1579 (1967). The situation is no different here.

14. Based on the above discussion, we find that the public interest would be served by allotting Channel 272A to Brownsville, Oregon, as the community's first local FM service. As proposed, we shall also modify the license of Central Coast Broadcasting Co., Inc. for Station KYQT, Newport, Oregon, to specify operation on Channel 274C1 in lieu of its present Channel 273C1. Channel 272A can be allotted to Brownsville in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction. Channel 274C1 can

be allotted to Newport in compliance with the Commission's minimum distance separation requirements and can be used at Station KYQT's present transmitter site.[5]

15. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **August 8, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Brownsville, Oregon	272A
Newport, Oregon	274C1

16. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Central Coast Broadcasting Co., Inc. for Station KYQT, Newport, Oregon, IS MODIFIED effective **August 8, 1988,** to specify operation on Channel 274C1 in lieu of Channel 273C1, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

17. IT IS FURTHER ORDERED, That the Secretary shall send a copy of this *Report and Order* by Certified Mail, Return Receipt Requested, to the licensee of Station KYQT, as follows: Central Coast Broadcasting Co., Inc., Route 2, P.O. Box 408A, Otis, Oregon 97638.

18. The window period for filing applications for Channel 272A at Brownsville, Oregon, will open on **August 9, 1988,** and close on **September 8, 1988.**

19. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

20. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The communities of Newport, Oakridge and Reedsport, Oregon, have been added to the caption.

[2] Public Notice of the filing of the counterproposal was given on December 28, 1987, Report No. 1702.

[3] The Commission's Rules do not contemplate the filing of responses to reply comments. However, petitioner's response to School District's reply comments was filed within the time permitted for the filing of reply comments and will be considered as such.

[4] Petitioner erroneously referred to the Roseburg docket number as MM Docket No. 87-478.

[5] The coordinates for Channel 272A at Brownsville are North Latitude 44-23-48 and West Longitude 122-59-06. The coordinates for Channel 274C1 at Newport at North Latitude 44-45-24 and West Longitude 124-02-47.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-268

In the Matter of

Amendment of Section 73.202(b), RM-6141
Table of Allotments,
FM Broadcast Stations.
(Chandler, Indiana)

NOTICE OF PROPOSED RULE MAKING

Adopted: May 13, 1988; Released: June 23, 1988

By the Deputy Chief, Policy and Rules Division:

1. A petition for rule making has been filed by Brent R. Wookey (petitioner) proposing the allotment of FM Channel 228A on a hyphenated basis to the communities of Chandler and Yankeetown, Indiana, as a first local broadcast service. Petitioner stated his intent to apply for the channel if allotted.

2. Hyphenation is an allotment tool which we have used very sparingly. In the past, we have done so only where it appeared that the communities should be treated as one due to their nearness and mutual economic, trade, cultural and social interests. Chandler (population 3,043),[1] and Yankeetown (population 250),[2] both in Warrick County (population 41,474), are located 15.3 kilometers (9.5 miles) apart. According to the *Rand McNally Commercial Atlas and Marketing Guide* (1988 Ed.), Chandler is an incorporated community, which has its own post office and financial institutions. Yankeetown is not shown to contain any attributes of a community, and, in fact, is reported to receive mail through the Newburgh, Indiana, post office. Moreover, we note that Yankeetown is not listed in the U.S. Census.

3. In view of the above, we are unable to confirm that Yankeetown is a community for allotment purposes. Section 307(b) of the Communications Act of 1934, as amended, requires that the Commission fairly and equitably distribute frequencies "among the several States and communities." The Commission has defined "communities" as geographically identifiable population groupings. Generally, if a community is incorporated or listed in the U.S. Census, that is sufficient to satisfy its status. As indicated, *supra*, Yankeetown is not listed in the U.S. Census, nor has petitioner demonstrated that Yankeetown is incorporated or comprised of any of the components which are considered in determining community status such as churches, schools, library, post office, shopping centers, banks, newspapers, social and/or civic organizations or other indicia. *See Naples, Florida*, 41 RR 2d 1549 at 1553 (1977), *Coker, Alabama*, 43 RR 2d 190 at 193 (1978), and *Ansley, Alabama*, 46 FR 58688 (1981). If petitioner can provide a sufficient showing in supporting comments to establish that Yankeetown is a community pursuant to the Commission's criteria, then the allotment could be made to it or to Chandler.

4. Since petitioner has not provided us with any information to justify allotting Channel 228A to Chandler-Yankeetown on a hyphenated basis, we have, at this juncture, chosen Chandler as the community for the proposed allotment. However, if petitioner's intent is to have his proposed station identify with both places, then, pursuant to the provisions of Section 73.1201(b)(2) of the Commission's Rules, he may include Yankeetown in the station's official identification. If petitioner insists on a hyphenated allotment, he should submit additional evidence demonstrating community status for Yankeetown and showing how Chandler and Yankeetown are so interdependent that a hyphenated allotment is required.

5. A staff engineering analysis reveals that Channel 228A can be allotted to Chandler in conformity with the minimum distance separation requirements contained in Section 73.207(b) of the Commission's Rules. [3]

6. In view of the fact that Chandler could receive a first local broadcast service, the Commission believes it is appropriate to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to that community, as follows:

	Channel No.	
City	Present	Proposed
Chandler, Indiana	–	228A

7. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

8. Interested parties may file comments on or before **August 15, 1988,** and reply comments on or before **August 30, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, as follows:

Brent R. Wookey
10 Woodland Drive
Bismarck, Illinois 61814

9. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

10. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by

the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Population figures used herein were extracted from the 1980 U.S. Census unless otherwise noted.

[2] Population figure taken from the Rand McNally Commercial Atlas (1988 Ed.).

[3] This determination is based on the use of city reference coordinates for Chandler at 38-02-36 and 87-22-18.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-269

In the Matter of

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Frankfort and Stephenson, Michigan)	RM-6281

NOTICE OF PROPOSED RULE MAKING

Adopted: May 17, 1988 **Released: June 22, 1988**

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it for consideration a petition for rule making filed by Forum Communications, Inc. (petitioner), licensee of FM Station WBNZ(FM), Frankfort, Michigan, seeking the substitution of Channel 257C2 for Channel 257A at Frankfort. Petitioner also requests the modification of its license for Station WBNZ(FM) to specify Channel 257C2 instead of Channel 257A.

2. We believe petitioner's proposal warrants consideration. Channel 257C2 can be allocated to Frankfort in compliance with the minimum distance separation requirements of Section 73.207 of the Commission's Rules at its current site provided vacant Channel 257A is deleted from Stephenson, Michigan.[1] Petitioner has proposed the substitution of Channel 261A for Channel 257A at Stephenson. Channel 261A can be allotted to Stephenson consistent with the mileage separation requirements.[2,3] Since Frankfort and Stephenson, Michigan, are both located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence of the Canadian government will be required. We shall also propose to modify the license of Station WBNZ(FM), Channel 257A, to specify operation on Channel 257C2 in accordance with Section 1.420(g) of the Commission's Rules.

3. In order to provide a wide coverage area station for the Frankfort, Michigan area, the Commission PROPOSES TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, as follows:

	Channel No.	
City	Present	Proposed
Frankfort, Michigan	257A	257C2
Stephenson, Michigan	257A	261A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **August 15, 1988,** and reply comments on or before **August 30, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Robert Paul Brink
President, Forum Communications, Inc.
Post Office Box 980
Otsego, Michigan 49078

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief, Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the

Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] The coordinates for Channel 257C2 at Frankfort are 44-36-38 and 86-09-38.

[2] The coordinates for Channel 261A at Stephenson are 45-24-54 and 87-36-24.

[3] Channel 261A at Stephenson previously conflicted with Channel 264C at Crystal Falls, Michigan. However, by Report and Order in MM Docket 87-379, adopted April 25, 1988, Channel 264C at Crystal Falls, Michigan, was down graded to Channel 264C1, thus removing the conflict.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-271

In the Matter of

Amendment of Section 73.202(b), RM-6357
Table of Allotments,
FM Broadcast Stations.
(Farmville, Virginia)

NOTICE OF PROPOSED RULE MAKING

Adopted: May 13, 1988; Released: June 23, 1988

By the Deputy Chief, Policy and Rules Division:

1. At the request of James H. Dulaney (petitioner), the Commission considers herein a petition for rule making seeking the allotment of Channel 267A to Farmville, Virginia, as that community's second local FM service. Petitioner states his intention to apply for the channel, if allotted. The allotment can be made to Farmville in compliance with the Commission's minimum distance separation requirements.[1]

2. In view of the fact that Farmville, Virginia, could receive its second local FM channel the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Farmville, Virginia	239B	239B, 267A

3. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

4. Interested parties may file comments on or before **August 15, 1988,** and reply comments on or before **August 30, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Lauren A. Colby, Esquire
Law Office of Lauren A. Colby
10 E. Fourth Street
P. O. Box 113
Frederick, MD 21701
(Counsel for petitioner)

5. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

6. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates are 37-18-00 and 78-23-48.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-356

In the Matter of

Amendment of Section 73.202(b), RM-5871
Table of Allotments,
FM Broadcast Stations.
(Alamo, Tennessee)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: May 13, 1988; Released: June 23, 1988

By the Deputy Chief, Policy and Rules Division:

1. At the request of Charles C. Allen (petitioner), the Commission has before it for consideration the *Notice of Proposed Rule Making*, 2 FCC Rcd 5606 (1987), proposing the allocation of Channel 263A to Alamo, Tennessee, as that community's first local FM service. In response to the *Notice*, petitioner filed supporting comments stating his intention to apply for the channel. Comments were also filed by MSB Communications Corporation (MSB),[1] licensee of Station KDEZ(FM), Channel 261A, Jonesboro, Arkansas and Dr Pepper Pepsi-Cola Bottling Company of Dyersburg, Inc. (Dr Pepper), licensee of Station WASL(FM), Channel 261A, Dyersburg, Tennessee.[2] Petitioner subsequently filed a "Motion to Sever." Dr Pepper responded in support of the motion.

2. MSB suggests that Channel 226A be considered at Alamo in lieu of the proposed allotment of Channel 263A, in order that its proposal to upgrade Station KDEZ(FM) from a Class A facility to Channel 263C1 could be considered. Dr Pepper, in a counterproposal, also requested Channel 226A as an alternative allotment to Alamo. Dr Pepper states that the proposal as stated in the *Notice* would have a severely restrictive if not prohibitive impact upon its pending proposal to upgrade. Petitioner, in its motion to sever, states that since Class A FM channels are equal it would accept and apply for Channel 226A, if allotted. Therefore, we shall consider Channel 226A at Alamo in lieu of the proposed Channel 263A.

3. In view of the aforementioned, we believe the public interest would be served allocating Channel 226A to Alamo, Tennessee, as that community's first FM service. The channel can be allotted to Alamo in compliance with the Commission's minimum distance separation requirements.[3]

4. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **August 8, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Alamo, Tennessee	226A

5. The window period for filing applications will open on **August 9, 1988,** and close on **September 8, 1988.**

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Although MSB addressed its filing as reply comments, they were timely as and we are considering them as comments.

[2] Dr Pepper has a proposal before the Commission to substitute Channel 261C2 for Channel 262A at Dyersburg, Tennessee, in MM Docket No. 87-563. *See* 2 FCC Rcd 7466 (1987).

[3] The coordinates are 35-47-06 and 89-07-06.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 79-184

In the Matter of

Inquiry into the Policies to Be
Followed in the Authorization of
Common Carrier Facilities to
Meet North Atlantic
Telecommunications Needs
During the 1991-2000 Period.

REPORT AND ORDER

Adopted: May 18, 1988; Released: June 24, 1988

By the Commission: Commissioner Dennis concurring in the result.

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I. INTRODUCTION

1. The purpose of this proceeding is to develop policies and guidelines for the construction and use of cable and satellite facilities to meet demands for common carrier services in the North Atlantic Region during the 1991-2000 period. This phase of the proceeding was initiated on April 10, 1987, with the release of our Fourth Notice of Inquiry (NOI)[1] followed by a Third Notice of Proposed Rule Making (NPRM), released on January 15, 1988.[2]

A. Notice of Inquiry

2. We indicated in the NOI that we were specifying 1991 as the beginning of the planning period in order to allow consideration of a United States International Service Carriers' (USISCs) [3] proposal for implementation of a TAT-9 digital, optical fiber cable as early as 1991.[4] We also indicated that we were extending the period under consideration from 1995 to 2000 because we believed that consideration of traffic forecasts, technological options and other planning information for only the five year period between 1991-1995 was too limited to permit proper evaluation of alternative facilities plans. We requested the USISCs and Communications Satellite Corporation (Comsat) to submit planning data, including traffic forecasts, available technological facilities options, cost information, service reliability information and alternative facilities plans which assume use of different facilities and vary the time of introduction of new facilities. We also specifically requested the parties to the proceeding to address the effect of alternative facilities plans on the four objectives -- open entry, nondiscrimination, technological innovations and international comity -- that we established to examine the interrelationship of foreign telecommunications policies and practices to our regulatory policies.[5] Comments concerning the addition of Portugal as a sixth landing point were also requested.

3. In response to the NOI, the USISCs submitted a single plan which called for the introduction of a TAT-9 optical fiber cable in 1991, landing in the United States, Canada, the United Kingdom, France and Spain. The proposed TAT-9 cable system configuration would consist of two fiber pairs, each operating at 565 Megabits per second (Mb/s) and utilizing 1.5 micron wavelength lasers. The USISCs argued the need to implement the cable in 1991 based on increased demand, digital connectivity with the Mediterranean region, restoration of the TAT-8 fiber optic cable, improved media and route diversity, greater technological options and acceptance of the plan by over twenty-five foreign correspondents. Comsat submitted three alternative plans which did not contemplate the need for additional cable facilities during the planning period. Comsat's alternative plans included INTELSAT's "current nominal satellite deployment plan," which anticipates six satellites in the Atlantic Ocean Region (AOR). The other two plans called for five and four satellites in the region during the 1991-2000 period. Private Transatlantic Telecommunications System, Inc. (PSI), in its submission, argued that the Commission should consider the impact of privately owned non-common carrier cables on the need and timing of the TAT-9 cable in the North Atlantic planning process and contended that TAT-9 is not necessary to restore communications on TAT-8 because PTAT-1 can provide that capacity. Additionally, Pan American Satellite (PAS) requested that the Commission consider the availability of its space segment capacity in evaluating the need for new North Atlantic facilities during the post-1991 planning period.

4. By letter dated August 20, 1987, the Department of State (DOS), at the request of the Embassy of Portugal, forwarded a memorandum from the Embassy pertaining to the provision of a TAT-9 landing point in Portugal. A November 17, 1987 filing by the Department of Defense

(DoD) states that it supports the timely installation of the TAT-9 cable as well as a Portugal landing point for the TAT-9 cable in order to enhance the diversity of the TAT-9 system. Additionally, on October 9, 1987, AT&T and Comsat submitted an Agreement[6] which established a set of commitments relating to AT&T's worldwide use of Comsat's INTELSAT space segment capacity for International Message Telephone Service (IMTS) circuits through 1994 and established a framework for discussions and exchange of information that will provide a basis for AT&T's further use of Comsat's INTELSAT space segment capacity after 1994. In a letter filed on November 9, 1987, Comsat stated that it will not oppose construction of the TAT-9 cable if the AT&T/Comsat Agreement is approved and the tariffs associated with that Agreement enter into force.[7]

B. Notice of Proposed Rule Making

5. On January 15, 1988, we released an NPRM in which we reached certain tentative conclusions for the construction and use of facilities for the North Atlantic region during the 1991-2000 time period. We tentatively concluded that the public interest will be served by the introduction of a digital, optical fiber TAT-9 cable system as early as 1991.[8] In reaching this tentative conclusion, we applied the following criteria: traffic forecasts, demand flexibility, cost, service reliability, foreign correspondent acceptance, digital connectivity, furtherance of the Commission's pro-competitive policies, satisfaction of defense communications requirements and other relevant factors. Based on our consideration of these criteria, we tentatively concluded the following: 1) that TAT-9 will enhance both media and path diversity;[9] 2) that TAT-9 will provide a viable restoration alternative for TAT-8 and other facilities;[10] 3) that TAT-9 will serve the public interest by providing direct digital connectivity with the MAT-2 and EMOS-1 cable systems[11] resulting in a digital, optical fiber network extending from North America into the Mediterranean; 4) that introduction of TAT-9 in 1991 will further increase intermodal and intramodal competition; 5) that the USISCs' plan is preferred from the standpoint of correspondent acceptance and that the timing of TAT-9, MAT-2 and EMOS-1 cables should be fully coordinated; 6) that there is no present basis to consider private cable facilities in the context of the North Atlantic Planning Process at this time; 7) that there is no basis to consider PAS's satellite facilities in the context of the North Atlantic planning at this time; and 8) that while sufficient demand flexibility exists to accommodate USISCs' traffic demand for a major portion of the planning period, it is not clear whether DoD's estimate of circuit requirements were included in the USISC forecast. We also noted that the introduction of the TAT-9 digital, optical fiber cable will: 1) promote national security interests by satisfying the operational requirements of DoD in the Atlantic and Mediterranean regions and 2) provide further technological innovations which should provide users with the widest range of alternatives in meeting their specific service requirements.

6. We reached no tentative conclusion on the specific configuration for the TAT-9 cable, particularly with regard to whether a Portugal landing point should be provided in addition to the other three European landing points. In light of DoD's comments and the memorandum from the Embassy of Portugal, we specifically requested further comment from the USISCs on this issue. We also requested additional information on the following issues: 1) the need for providing digital connectivity with the Mediterranean region through TAT-9 rather than a TAT-8 spur; 2) whether authorized digital cable facilities (*i. e.* TAT-8) will provide sufficient demand flexibility to meet the perceived USISCs' demand for digital terrestrial services and the amount of capacity required to satisfy that demand; 3) the allocation of contract awards for construction of the various TAT-9 cable segments and how excess capacity, particularly on the U.S. end, will be owned; and 4) whether DoD's circuit projections were included in the USISCs' circuit projections. In addition, Comsat and the USISCs were requested to provide more information pertaining to costs. Specifically, Comsat was asked to submit information requested in the Fourth NOI and the USISCs were asked to provide cost analyses on an investment basis.

7. We also found that there was insufficient information pertaining to INTELSAT follow-on-satellites (FOS) to reach any tentative conclusion regarding the number and type of such satellites to be deployed. Finally, we tentatively concluded that facilities planning for the latter portion of the 1991-2000 period could be deferred until a later time.

C. Responses to the NPRM

8. On February 16, 1988, the USISCs,[12] Comsat and DoD filed responses to the NPRM which included the additional information that we requested in the NPRM. PSI, PAS and Submarine Lightwave Cable also submitted comments in response to the NPRM.

9. The USISCs maintain that the proposed TAT-9 cable is the "core of the facilities plan"[13] developed by them in conjunction with foreign correspondents for meeting the region's telecommunications needs for the 1991-2000 period. In addition to providing a viable restoration alternative for TAT-8, the USISCs reiterate the benefits TAT-9 will provide by enhancing media and path diversity, establishing digital connectivity with the MAT-2 and EMOS-1 cables, increasing intramodal and intermodal competition, introducing the latest developments in fiber optic technology to the region and promoting international comity. The USISCs state that the European parties could not agree to a cable configuration with landings in both Spain and Portugal. Due to the desired connectivity with the MAT-2 and the EMOS-1 cables at Spain, the USISCs assert that inclusion of Portugal as a landing point was not deemed feasible. Connection of TAT-8 via a spur to Portugal was also viewed as an impractical alternative, since the transatlantic segment of TAT-8 is fully subscribed and utilization of a TAT-8 spur terminating in Portugal would be limited to a total of 59 Minimum Assignable Units of Ownership (MAUOs). According to the USISCs, 59 MAUOs represent a little less than two 2.048 Mb/s streams on a 280 Mb/s fiber pair, the minimum design capacity of a single fiber that would be used for the TAT-8 spur. Because the transatlantic segment of TAT-8 is fully subscribed, there would be no available capacity to accommodate additional requirements for North America to Portugal traffic. Thus, they assert that a TAT-8 spur would be grossly underutilized. Moreover, they note that a recent announcement[14] for the proposed construction of a cable between Portugal and France (TAGIDE-2), with possible extensions to the United Kingdom and Morocco, is a more desirable alternative that obviates the need for further consideration of a Portugal landing point. Accord-

ing to the USISCs, the TAGIDE-2 cable would allow connection of both TAT-8 and TAT-9 to Portugal, via France, and would offer an alternative route in the event of a failure of either the France or Spain branches of TAT-9. In addition, the USISCs note that TAGIDE-2 will provide greater diversity and flexibility in the routing of U.S. traffic to Portugal and beyond and will be capable of providing optimum restoration capabilities for both the TAT-8 and TAT-9 cables. The USISCs also state that the TAGIDE-2 cable accommodates the wishes of the European parties while extending the benefits of digital fiber optic technology to Portugal directly. The USISCs note that introduction of the TAGIDE-2 cable would promote the interests of DoD by providing additional restoration capabilities for TAT-8 and TAT-9 and enhancing route diversity. The USISCs also point out the strong preference by the European community to interconnect the two Mediterranean cables via TAT-9 rather than a TAT-8 spur because of cost considerations and coordination of service dates in order to avoid a break in the concatenation of digital fiber optic facilities that are planned to extend from Israel to the North American continent.[15]

10. On the issue of demand flexibility, the USISCs express concern that a reduction in demand flexibility would occur if the deployment of TAT-9 were delayed, thereby potentially jeopardizing the ability of the TAT-9 owners to meet the projected North Atlantic regional needs. They note that the adverse impact may be very significant in light of DoD's projections which indicate digital circuit requirements equivalent to 1190 64 Kilobits per second (Kb/s) circuits by fiscal year 1989. Since DoD's digital circuit requirements are not reflected in the USISCs' forecasts submitted in response to the Fourth NOI, the USISCs point out that the forecast that they submitted is a very conservative projection of demand requirements for the planning period. Although the specific routing of DoD's circuit requirements is unknown, the USISCs maintain that TAT-8 alone could not carry all of the specific DoD requirements without a severe impact on that facility's ability to maintain an acceptable level of demand flexibility. Moreover, the USISCs argue that it is impossible to gauge the demand flexibility of TAT-8 without taking into account the unique configuration of TAT-9, which has been designed also to accommodate the demand requirements between the United Kingdom and Spain.

11. With respect to excess capacity, the USISCs state that as of December 10, 1987, the entire transatlantic design capacity of TAT-9 has been fully assigned among existing TAT-9 owners and among existing and future owners or IRU (Indefeasible Right of User) holders. They note that capacity for future owners or IRU holders is held in appropriate capacity pools.[16]

12. In response to our inquiry on contract awards, the USISCs also state that participation in the construction of the TAT-9 cable is expected to include AT&T for that portion of the system that extends from the United States and Canada to a mid-Atlantic point of the TAT-9 cable system. However, since contracts will not be awarded until September, 1988, the USISCs could not comment on what percentage of the main cable (Segment F) will be awarded to AT&T in the construction contract.

13. The USISCs provided a cost analysis in the form of use-related rather than an investment related methodology that we requested in the NPRM. The USISCs submit that the use-related methodology, which they contend provides a far more accurate reflection of their costs than an investment related methodology, examines the expenditures that will actually be incurred by them in providing telecommunications services over the planning period. Such costs include investment and operating and maintenance costs for facilities owned by the carriers, as well as the costs of leasing facilities, including charges for transit facilities, that the carriers do not own.

14. The USISCs state that the use-related methodology also reflects the actual cost to the USISCs of utilizing satellite capacity because it employs the tariff lease rates for satellites. The USISCs contend that the only means currently available to obtain space segment capacity is to pay the tariff rate charged by Comsat. They state that this rate represents a direct cost to the USISCs and, therefore, must be considered in their business decisions and internal budgeting plans. Hence, the USISCs believe that the use-related methodology more accurately identifies the actual costs that will be incurred by them in the provision of their services than does an investment related methodology.

15. Comsat does not oppose our tentative conclusion to approve introduction of the optical fiber TAT-9 cable system as early as 1991, conditioned upon the Commission accepting the Agreement between Comsat and AT&T.[17] Comsat notes that the Agreement satisfies its concerns that construction of the TAT-9 cable could adversely affect the USISCs' use of the INTELSAT system. Comsat states that the Agreement negotiated with AT&T establishes a set of commitments relating to AT&T's utilization of Comsat's INTELSAT space segment capacity for IMTS circuits activated through the early portion of the planning period and establishes a framework for discussion of AT&T's further use of Comsat's INTELSAT space segment capacity during the latter part of the planning period.

16. As requested in the NPRM, Comsat submitted more detailed information with respect to INTELSAT Operating and Maintenance (O&M) costs, INTELSAT VA and VI satellite launch costs and launch insurance costs. Comsat also provided the latest information available from INTELSAT on the costs of follow-on-satellites (FOS). As indicated in Comsat's response to Appendix B, filed June 4, 1987, Comsat's three alternative plans deploy three, two or one FOS into the AOR during the 1991-2000 planning period in order to have configurations of six, five and four satellites, respectively. INTELSAT totals and Comsat's share of such totals have been calculated for each of the three alternative plans. The satellite facilities costs are grouped into three categories: 1) committed programs (satellites in service prior to 1991); 2) incremental facilities (satellites entering service from 1991-2000); and 3) O&M expenses between 1991 and 2000. Comsat states that only the incremental costs and O&M expenses are relevant for the planning period. It notes that committed programs are not included because these costs are sunk and cannot be avoided in any of the plans. The costs associated with each of the alternative plans are as follows: Plan-1 (479.25 million); Plan-2 (408.73 million); and Plan-3 (333.57 million). Depending on which plan is actually implemented, Comsat states that it could "save" from60 million to128 million, reflecting the cost differences in reducing the AOR satellite configuration from six to five to four satellites in the AOR. Projected total INTELSAT cost of incremental satellite facilities as well as INTELSAT's total cost and Comsat's share of these costs allocated to the

AOR are provided.[18] Comsat's share of spacecraft, incentives, launch, insurance and program costs are provided for each satellite for the years 1991-2000.

17. PSI contends that the availability of the capacity of its PTAT-1 cable should be considered as an external marketplace reality in the NACP, and consequently, as an important consideration in the Commission's public policy determinations with respect to facility authorizations. PSI maintains that consideration by the Commission of PTAT-1 in its determinations in this proceeding will ensure that the Commission accounts for both the impact on the public of introducing rate-based transatlantic facilities and recognizes the ability of other fiber optic systems to meet the non-demand related TAT-9 policy objectives identified in the NPRM. PSI asserts that the Commission's stated goal of promoting intramodal competition can be achieved if the introduction of the TAT-9 cable is appropriately timed and accomplished under the proper structural safeguards. PSI is concerned that AT&T would have the incentive and opportunity to underprice transmission capacity through cross-subsidization from its guaranteed rate of return on other domestic and international rate base facilities. Therefore, PSI urges the Commission to adopt a regulatory scheme which will treat TAT-9 as an entity structurally independent from AT&T in order to ensure that TAT-9 will not be unfairly supported by subsidies from AT&T's domestic and international rate base customers.

18. PSI argues that the USISCs have failed to provide certain specific information requested by the Commission. According to PSI, the carriers' evaluation of DoD circuit requirements was wholly inadequate, the carriers' demand flexibility statements were inconclusive, the carriers failed to present data that would justify a TAT-9 spur to Spain and the carriers also failed to provide the investment cost information requested by the Commission. PSI maintains that the use-related methodology was utilized because it would place costs that are not directly related to TAT-9 into the TAT-9 ratebase which would facilitate cross-subsidization of TAT-9. PSI also states that full subscription of the TAT-8 cable refers only to the ownership interests and is irrelevant because ownership interests bear little, if any, relation to the capacity needs of end users. PSI asserts that its own cable facilities can be used as a backup source for the TAT-8 cable and that it offered TAT-8 owners a mutual PTAT-1/TAT-8 restoration agreement.[19] PSI believes that, in view of the diversity created by PTAT-1, the Commission should not rest its public interest determination to authorize construction of TAT-9 on the additional media and path diversity that will be provided by TAT-9. Finally, PSI urges the Commission not to allow international comity to be the decisive factor in approval of the TAT-9 cable system. PSI believes that it would be unlawful and improper for regulatory policy to be dictated solely by the interests of a few telecommunications administrations.

19. PAS argues that the Commission should consider its facilities in this proceeding for the following reasons: 1) its application to operate its 6 Ku-band transponders for U.S.-European service has now been granted; 2) the Commission should assume, for purposes of the instant proceeding, that PAS will be able to successfully coordinate these North Atlantic facilities under Article XIV(d); and 3) although PAS may not be able to interconnect with the Public Switched Network (PSN), it would be able to offer services, such as video and data, that common carriers may wish to provide via the PAS satellite. PAS also contends that the members of the European Conference of Postal and Telecommunications Administrations (CEPT) are engaging in a concerted and discriminatory refusal to deal with U.S. separate satellite systems.[20] PAS asserts that the Commission should be taking a position that individual members of CEPT must accept U.S. separate satellite systems on a nondiscriminatory basis.

20. PAS agrees that information pertaining to INTELSAT FOS is insufficient, but argues that the Commission should convene a separate proceeding on the subject of Comsat's and INTELSAT's AOR capacity needs. PAS maintains that the normal instructional and application processes do not provide a useful forum for meaningful, comprehensive and precise exchanges of information concerning the INTELSAT FOS. Specifically, PAS maintains that "INTELSAT and Comsat have a history of launching satellites based upon overestimates of the demand for new INTELSAT services, and then selling the excess capacity below cost for the provision of domestic services."[21] PAS states that its conclusions have been substantiated by a study prepared by Economists Incorporated.[22] PAS asserts that the problem of excess capacity is likely to be exacerbated by circuit multiplication techniques that INTELSAT and Comsat will implement over the next few years. PAS argues that the current instructional and application processes do not provide adequate opportunity for interested members of the public to comment on key INTELSAT issues prior to decisions being made by INTELSAT's Board of Governors. Finally, PAS recommends that the Commission uphold a policy of allowing Comsat to withhold payment for a proportionate share of its costs associated with the North Atlantic facilities until the Commission is satisfied that the facilities are needed, that INTELSAT has no predatory or anticompetitive motive and U.S. ratepayers will not have to bear any disproportionate burdens with respect to the facilities.

21. DoD endorses the installation of TAT-9 by 1991 and plans to complete its circuit requirements using a mix of media to achieve and maintain the necessary diversity and redundancy. According to its initial comments, it was DoD's understanding that its circuit projection requirements were included in the USISC's projections but not specifically identified as such. However, DoD, in a later submission, stated that "it does not appear possible that our specific requirement could have been included in the carriers' traffic forecasts, since our release of this information was subsequent to the carriers formulation of their traffic forecast data."[23] Finally, Submarine Lightwave Cable (SLC) Company states that it is interested in the "ultimate design" of TAT-9. SLC believes that, related to the ultimate design issue are questions regarding utilization of excess capacity, coverage of capacity shortage, technological innovations spurred by TAT-9, and new services to be provided via TAT-9.

D. Reply Comments to the NPRM

22. In their reply comments, the USISCs[24] maintain that PSI is the only entity that opposes the timely introduction of the TAT-9 cable system. The USISCs argue that PSI is essentially advocating that its private cable system, PTAT-1, supplant TAT-9. The USISCs maintain that PSI's position is directly at odds with its earlier position taken in the application and the Commission's decision in approving PTAT-1.[25] They assert that private cable systems were intended by the Commission to introduce a level of in-

tramodal competition with common carrier facilities. The USISCs maintain that PSI, if made the sole source of additional fiber optic cable capacity, would eliminate intramodal competition. The USISCs point out that TAT-9 also has unique features not duplicated by the PTAT-1 cable. For example, they note that PSI would not be able to provide a direct link between North America and the Mediterranean region cables, the MAT-2 and the EMOS-1 cable systems. Furthermore, they note that the international links needed to connect PTAT-1 with the MAT-2 cable are not yet planned or authorized. The USISCs state that the TAT-9 cable provides efficient and cost effective interconnection with the Mediterranean region through interconnection with the MAT-2 and EMOS-1 cable systems. Additionally, they note that TAT-9's design will result in enhanced diversity and restoration capabilities which PTAT-1 cannot fully duplicate. The USISCs also refute PSI's claim that the cost of capacity in PTAT-1 is more economical than the cost of obtaining capacity in TAT-9. The USISCs point out that there is a cost disadvantage associated with both the capacity and the landing point configuration of PTAT-1.[26]

23. In response to PSI's structural separation proposal, the USISCs state that no structural separation requirements were ever imposed or contemplated for common carriers' ownership of transmission facilities to provide basic services. They note that in the *Second Computer Inquiry* [27] structural separation applied only to the provision of Customer Premise Equipment (CPE) and enhanced services - not to competitive ventures in general. PSI, the USISCs argue, makes no showing that AT&T's participation in the ownership of TAT-9 in any way violates the Commission's non-structural safeguards. Therefore, AT&T states that structural separation and nonstructural safeguards are not applicable to the ownership of the TAT-9 system.

24. PSI asserts that the USISCs have failed to provide information that accurately reflects the extent to which DoD's circuit requirement projections are included in the USISCs' forecast for projected demand in the North Atlantic region during the planning period. It also states that the USISCs' statements concerning demand flexibility are inconclusive. PSI maintains that the USISCs' argument that TAT-8 is fully subscribed is erroneous because full subscription means only that ownership interests in TAT-8 have been fully allocated. PSI asserts that ownership interests bear no relation to the capacity needs of end users. It notes that the USISCs also have failed to provide the investment related cost analysis asked for by the Commission. PSI also maintains that the USISCs have failed, on a cost justification rationale, to provide evidence that a TAT-9 spur to Spain is superior to the alternative TAT-8 spur to Spain. Therefore, PSI argues that the Commission either should not authorize TAT-9 for introduction in the requested timeframe or that the Commission should establish TAT-9 as a separate non-ratebase entity and substitute effective price regulation of AT&T's ratebase services.[28]

25. Comsat reiterates that it supports the Commission's tentative conclusion to approve construction of TAT-9, conditioned upon the Commission accepting the Agreement between Comsat and AT&T concerning loading distribution requirements.[29] The Agreement, asserts Comsat, serves the public interest, allows both parties substantial flexibility and provides Comsat with the incentive to compete for all other carriers' traffic, both prior to and after 1994.

26. PAS, in its reply comments, again emphasizes that private facilities should be considered in the North Atlantic planning process in order to inject a meaningful element of competition into the transatlantic market. The Commission's refusal to recognize private systems, PAS argues, exacerbates the increasingly significant barrier that vertical integration creates in a market. Having adopted policies in favor of separate systems, PAS believes that the Commission should not undercut those policies by ignoring these facilities in the North Atlantic planning process. With respect to handling FOS issues in the normal instructional and application processes, PAS, based on the study performed by Economists Incorporated, points out that many of the costs associated with excess capacity could be avoided if some of the satellites are cancelled or delayed. PAS argues that Comsat's assumptions and conclusions should be tested in a proceeding that examines all relevant factors in Comsat/INTELSAT procurement decisions.

27. MCII urges the Commission to conclude that the TAT-9 cable system proposed by the USISCs should be constructed for service in 1991. MCII states that the Commission has developed a record which extensively substantiates the public benefits to be derived from introduction of TAT-9 in 1991. Pointing out that restoration of TAT-8 is not the primary justification for TAT-9, MCII notes that there is a great possibility that traffic demand forecasts for the North Atlantic region have been very conservative and that actual demand may be significantly higher than presently anticipated. MCII also opposes the argument raised by PSI and PAS that private facilities systems should be included in the planning effort. MCII maintains that the Commission has properly concluded that consideration of those facilities is not appropriate because they are not common carrier facilities.

II. DISCUSSION

28. Based on the comments and reply comments submitted, we affirm our tentative conclusion in the NPRM that the USISCs' plan to introduce a TAT-9 digital optical fiber cable in the North Atlantic region linking the United States, Canada, the United Kingdom, France and Spain, is in the public interest. Our conclusion is based on our findings that introduction of the TAT-9 cable in 1991 will: 1) meet the specific service requirements for digital cable facilities; 2) provide restoration of the optical fiber TAT-8 cable and other facilities while increasing both media and path diversity; 3) provide digital connectivity with the MAT-2 and EMOS-1 cables; 4) satisfy the operational requirements of DoD in the Atlantic and Mediterranean regions; 5) provide further technological innovations which should provide users with the widest range of service options; 6) further enhance intermodal and intramodal competition; and 7) promote international comity. We do not reach any conclusion on the number and type of INTELSAT FOS to be deployed in the North Atlantic region.

A. Traffic Forecasts

29. In the NPRM we examined the combined USISCs' traffic forecasts of U.S.-CEPT circuit demand derived from the USISCs' individual responses to the Fourth NOI. (*See* Table 1.) We also had before us more recent forecasts of U.S.-CEPT circuit demand for selected years prepared separately by the U.S. and CEPT delegations to the No-

vember 17-19, 1987 North Atlantic Consultative Working Group (NACWG) meeting. We noted that both the U.S. and CEPT delegations' forecasts projected a larger demand for U.S.-CEPT circuits in 1987, 1990 and 1995 than the earlier USISCs' forecast in response to the Fourth NOI. (*See* Table 2.) Specifically, the USISCs' May 1987 traffic forecast projected a need for 30,496 equivalent voice-grade circuits in 1990, 57,350 in 1995 and 108,599 in 2000, the end of this phase of the planning period. The USISCs' November 1987 NACWG meeting forecast projected a need for 36,938 equivalent voice-grade circuits in 1990, 66,295 in 1995 and 118,293 by year 2000. The CEPT November 1987 NACWG meeting forecast was similar to the USISCs' November 1987 NACWG meeting forecast, for the years 1990 and 1995, projecting a need for 36,454 equivalent voice-grade circuits in 1990, with 64,050 and 107,908 projected for 1995 and 2,000, respectively. The USISCs have indicated that their forecasts have been extremely conservative. MCII notes that actual demand requirements may be higher than presently anticipated. As noted herein with respect to DoD's requirements, it appears that the updated forecasts submitted by the USISCs and CEPT at the November 1987 NACWG were conservative.

30. We also noted in the NPRM that DoD had submitted projection of its transoceanic circuit requirements for fiscal years 1988 and 1989. DoD's projection indicated a requirement for 48 1.544 Mb/s, 38 64 Kbps and 2 Alternative Voice-Data (AVD) circuits on U.S.-CEPT routes during fiscal years 1988 and 1989. The above digital circuit requirements are the equivalent of 1190 64 Kb/s circuits. DoD also estimated that its wideband digital requirements will quadruple over the next five to ten years. Assuming that its U.S.-CEPT requirements increased by the same amount, we noted that DoD may require the equivalent of 4,760 64 Kb/s circuits on U.S.-CEPT routes over the next five to ten years, or approximately 63% of the 7,560 64 Kb/s circuit total capacity of TAT-8. However, DoD's pleading did not indicate whether its requirements were included in the USISCs' traffic forecast or whether its requirements would be routed over cable or satellite facilities. We specifically requested the USISCs and DoD to address the issue of DoD's projections and any other recent developments relating to their circuit forecasts in their response to the NPRM.

31. DoD states that it will satisfy its requirements using a mix of facilities. DoD does note, however, that in some cases reliance on satellite services may not be possible due to technical limitations. Based on this statement and DoD's interest in maintaining diversity in routing its traffic, it appears that DoD will route a significant portion of its requirements via digital, fiber optic cable facilities. Although we cannot measure precisely the total projected demands of the USISCs and DoD for digital, fiber optic cable facilities, we can approximate the degree of this need based on certain conservative assumptions as to DoD's requirements.

32. Table 3, attached hereto, shows the projected demand of digital cable facilities (i.e. 64 Kb/s bearer circuits). The demand is noted separately for the USISCs and DoD. The USISCs' demand was derived from their traffic forecast and their estimate as to which portion would be routed via digital cable facilities. DoD's demand was developed using its projected requirement of 1,190 64 Kb/s circuits for 1989 as a base, and assuming that its circuit requirements would quadruple over the next ten years. In addition, it is assumed that DoD will place 50% of its requirements on digital cable facilities. Based on these assumptions, we estimate that DoD will require 952 64 Kb/s digital cable circuits in 1991, the projected in-service date for TAT-9. When added to the USISCs' projected demands for digital cable facilities, a combined total of 5424 64 Kb/s circuits will be required in 1991. This total represents 74.6% of the U.S. ownership share in the TAT-8 cable. Using this same analysis, the combined requirements for digital 64 Kb/s cable circuits will total 6,978 in 1992, representing 95.9% of the U.S. ownership interests in TAT-8. The combined requirements for digital cable facilities in 1993 and 1994 represent 118% and 138%, respectively, of the U.S. ownership interest in TAT-8.

33. The above analysis demonstrates that the combined demands of the USISCs and DoD for digital 64 Kb/s cable circuits would essentially result in the saturation of TAT-8 by 1992. The saturation of TAT-8 could occur earlier if DoD makes greater use of cable facilities than we project or if there is an unforeseen growth in the USISCs' requirements for digital cable facilities. Thus, based on the projected demand for digital cable facilities, we conclude that introduction of TAT-9 in 1991 is required to satisfy this demand.

B. Demand Flexibility

34. In the NPRM we analyzed each of the plans from the standpoint of demand flexibility. We noted that a demand flexibility analysis of a given facilities plan is a useful measure of the ability of that plan to provide capacity during the planning period to satisfy unexpected increases in circuit demand above the levels currently forecast. We focused on a 20 percent demand flexibility (*i.e.*, the ability of a given plan to accommodate a circuit demand 20 percent larger than that forecast) as a reasonable measure of adequate demand flexibility. Based on the available satellite capacity provided under each of Comsat's three plans and the number of equivalent voice circuits available from TAT-6, TAT-7, CANTAT-2 and TAT-8, after its introduction into service in mid-1988, we concluded that these facilities would appear to provide adequate demand flexibility for a substantial portion of the planning period. However, we noted that there was insufficient information before us to examine whether authorized digital cable facilities will provide sufficient demand flexibility to meet a perceived demand for digital terrestrial services.

35. As noted previously, DoD's circuit requirements were not included in the USISCs' traffic forecast. Assuming DoD will route approximately 50% of its wideband digital requirements via digital fiber optic cable facilities, and combining the USISCs' projected demand for digital cable facilities, we conclude that there is insufficient demand flexibility to accommodate the projected demand for digital cable facilities. Our initial assessment as to the adequacy of demand flexibility in the NPRM only considered the ability of North Atlantic transmission facilities to accommodate unexpected increases in circuit demand beyond forecasted levels without considering the need to have particular requirements satisfied using specific transmission media. As noted in the foregoing discussion of traffic forecasts, the USISCs and DoD have identified a specific demand to be satisfied via digital cable facilities. This demand is significant enough that authorized facilities will not be sufficient to satisfy it beyond 1991.

36. In the NPRM we recognized that fiber optic technology may not be fungible with satellites. Specifically, on the issue of restoration, we noted that fiber optic technology may have certain features that might render repeated restoration via satellite undesirable. Although Comsat in its response to the NPRM questions the unique capabilities of fiber optic cable technology vis-a-vis satellites, it acknowledges that satellites are not fungible with fiber optic cables. DoD also states that although it plans to route its requirements using a mix of facilities, in some cases reliance on satellite services for certain requirements is not possible due to technical limitations. In light of the USISCs' and DoD's stated demands for digital cable facilities and statements on the record by the USISCs, DoD and Comsat that satellites are not fungible with fiber optic cables, we conclude that absent TAT-9, demand flexibility is insufficient to accommodate the demand for digital cable requirements (including wide-band digital services) beyond 1991.

C. Digital Connectivity

37. In the NPRM, we tentatively concluded that the establishment of digital connectivity with the proposed MAT-2 and EMOS-1 digital, optical fiber cables in the Mediterranean region via the TAT-9 cable will serve the public interest.[30] However, we also requested further comments on the need to obtain this connectivity via TAT-9 rather than through a TAT-8 spur to Spain.[31] In response to this request, the USISCs assert that use of a TAT-8 spur to Spain is not a viable option because: (1) the TAT-8 cable is fully subscribed and could not accommodate the needs of the USISCs and other administrations for cable capacity to the Mediterranean region; (2) the75 million now estimated by the USISCs as the cost of constructing a TAT-8 spur to Spain is more than the estimated59 million cost of the Spain leg of TAT-9; (3) the provision of a TAT-8 spur to interconnect with the Mediterranean optical fiber cables, while delaying the construction of TAT-9, would disregard the Canadian Administration's desire for a direct optical cable link to Europe and the Mediterranean which TAT-9, but not TAT-8, would provide; and (4) failure to have TAT-9 ready for service in 1991 as planned could jeopardize the construction of MAT-2 since MAT-2 also has a planned 1991 ready for service date.

38. PSI contends that TAT-9 is not the only optical fiber cable which could provide digital connectivity with the MAT-2 cable. It asserts that such connectivity could easily be provided by the TAT-8 or PTAT-1 cables. PSI states that the PTAT-1 cable could be connected to the Mediterranean region via either the United Kingdom-France-Portugal cable or the United Kingdom-Netherlands cable.

39. The USISCs assert that use of the PTAT-1 cable to provide digital connectivity to the Mediterranean optical fiber cables would not be feasible or cost effective. According to the USISCs, use of PTAT-1 in combination with either the United Kingdom-France-Portugal or the United Kingdom-Netherlands cables would require two additional links, including the construction of major terrestrial optical fiber facilities across Europe which are not now planned. The USISCs note that PSI provides no information on the projected costs, ownership arrangements or joint planning and construction timetables for such facilities or on the costs for extention facilities between the cable systems.

40. While the USISCs assert that TAT-8 is fully subscribed and cannot accommodate the needs of the USISCs and other Administrations for digital cable capacity to the Mediterranean region, they provide no information or analysis supporting this assertion. However, documents in our public files tend to support the USISCs' assertion. Appendix B of our TAT-8 order, authorizing the USISCs to participate in the construction and operation of the TAT-8 cable system[32], indicates that, at the time the TAT-8 cable application was filed, half interests in a total of 590 MAUOS (64 Kb/s circuits) were to be held by the USISCs for use with entities not parties to the TAT-8 C&MA.[33] These 590 circuits might be considered as a maximum upper limit of TAT-8 capacity available for use with a TAT-8 spur to Spain[34] if it can be assumed these circuits are not committed to other uses.

41. However, examination of Attachment E to the USISCs' TAT-8 application indicates that 88 of these 590 circuits were intended for use to European countries. Ninety-three of these 590 circuits were intended for use to countries in the Indian Ocean Region (IOR) and Africa for which the preferred routing may or may not be via the Mediterranean optical fiber cables.[35] The remainder of these 590 circuits were intended for use to Mediterranean countries.[36] Given the foregoing, the assumption that all 590 of these circuits would be available for use with a TAT-8 spur to Spain must be considered optimistic.[37]

42. Even if it is assumed that all 590 of these TAT-8 circuits would be available for use with a TAT-8 spur to Spain, they are not sufficient in number to provide connections for all of the capacity the USISCs currently propose to acquire in the MAT-2 cable. While no USISC Section 214 application for authority to participate in the construction and operation of the MAT-2 cable has yet been filed, a copy of the C&MA for that cable has been filed. Schedules D1 and D2 of that C&MA indicate that three USISCs, AT&T, MCII and US Sprint, propose to acquire half interests in a total of 712 MAT-2 circuits.[38] In addition, the Canadian international telecommunications entity, Teleglobe, proposes to acquire half interests in a total of 156 MAT-2 circuits. Thus, the number of MAT-2 circuits which the USISCs alone propose to acquire exceeds the 590 TAT-8 circuits which might be available to connect with those MAT-2 circuits.

43. Examination of Schedule E-6 of the Second Supplementary Agreement to the TAT-9 C&MA discloses that the USISCs propose to acquire half interests in a total of 1,703 circuits in the Spain branch of TAT-9.[39] The USISCs' proposed use of a total of 1,703 circuits in the transatlantic and Spain branch segments of TAT-9 far exceeds the 590 circuits in the transatlantic and France branch segments of TAT-8 which might be available for use in a Spain spur of TAT-8.[40]

44. Schedule E-6 also indicates that telecommunications entities of other countries in the Western Hemisphere and Pacific Ocean Regions (POR) propose the use of 514 circuits in the transatlantic and Spain branch segments of TAT-9. In total, Schedule E-6 indicates the proposed use of 2,217 circuits in the transatlantic and Spain branch segments of TAT-9. This far exceeds the 590 TAT-8 circuits which might be considered as available for use with a TAT-8 spur to Spain. Therefore, it would appear that a TAT-8 spur to Spain could satisfy projected cable use to Spain and the Mediterranean area for only a limited time. Thereafter, construction of a TAT-9 cable or another

transatlantic cable with a Spain landing point would be required if the projected cable use of the USISCs and other Administrations is to be made possible.

45. With regard to the USISCs' assertion that the estimated cost of75 million for construction of a TAT-8 spur to Spain is greater than the projected59 million cost of the TAT-9 Spain branch, we note that the USISCs failed to indicate how either projected cost was calculated. Information in the USISCs' TAT-8 application as reflected in our *TAT - 8 Authorization Order* indicates that the USISCs then projected the cost of a Spain spur for TAT-8 to be approximately54 million to60 million.[41] The derivation of the59 million projected cost for the Spain branch of TAT-9 is not immediately apparent.

46. While the USISCs and the other parties to this phase of the proceeding do not raise the issue, we believe it is appropriate to consider the effect of the provision of a TAT-8 spur on that cable's ability for self-restoration of certain types of failures. As set forth in our *TAT8 Authorization Order*,[42] the transatlantic portion of TAT-8 will contain a third fiber pair in addition to the two traffic bearing fiber pairs. The third fiber pair has the capability of restoring services carried on either of the two traffic bearing fiber pairs if either should fail.

47. The United Kingdom and France branches of TAT-8 will contain only two fiber pairs. Absent the provision of a Spain spur for TAT-8, the second fiber pair in each branch can be used to restore services carried on the traffic bearing fiber pair should it fail. However, since provision of a Spain spur for TAT-8 would require the use of the second fiber pair in the France branch of the cable and, perhaps, the second fiber pair in the United Kingdom branch as well, use of the second fiber pair for restoration of services on a failed traffic bearing pair in a branch would not be possible.[43] Thus, projection of a Spain spur for TAT-8 would reduce that cable's capability for self-restoration.

48. We agree with the USISCs that PSI's proposed use of the PTAT-1 and either the United Kingdom-France-Portugal or the United Kingdom-Netherlands cables in conjunction with unspecified additional facilities to provide digital connectivity to the Mediterranean optical fiber cables is not sufficiently defined to permit consideration. As observed by the USISCs, the specific routing of the traffic under either of these options, the type of additional facilities to be constructed, the timetable for construction of such facilities and the overall cost of acquisition of capacity in all facilities required by either route are unknown.

49. We also note that in our *TAT - 8 Authorization Order*, we stated in connection with our consideration of a Spain spur for TAT-8 that the U.S. has a strong national interest in direct, secure transmission channels to Mediterranean basin countries.[44] We noted that a Spain spur for TAT-8 could provide a direct transmission path for traffic to Mediterranean countries which now transits France or other European countries. We observed that a Spain spur for TAT-8, by reducing the need for transiting, could significantly reduce costs and increase service reliability.[45]

50. The TAT-9 cable with its Spain branch, in conjunction with circuits in the MAT-2 and EMOS-1 cables, can also provide a direct, secure transmission path to countries in the Mediterranean area. As was the case for the proposed TAT-8 Spain spur, the Spain branch of TAT-9 will land on the southern tip of Spain. Only a very short terrestrial facility is required to extend TAT-9 circuits to the MAT-2 cable terminal on the Mediterranean coast of Spain. Consequently, circuits from the United States to many Mediterranean area countries will be handled on submarine cable facilities for all but a very short portion of their route. The number of individual transmission systems which these circuits transit will also be quite small.

51. On the other hand, it does not appear that either of PSI's proposed routings for United States circuits to the Mediterranean area is likely to meet the concerns we expressed in our *TAT - 8 Authorization Order*. Under either PSI proposal, United States circuits destined to the Mediterranean area would, at minimum, transit two cable systems and one unspecified transmission facility before reaching the Mediterranean optical fiber cables. As observed by the USISCs, it may also be necessary for such circuits to transit other terrestrial transmission facilities between the terminals of the cables they must transit.[46] The nature of the unspecified facility (*i. e.*, submarine cable or terrestrial transmission facilities) is unknown to us. However, based on the record as it now stands, it does not appear that either of PSI's proposals would satisfy our concerns with directness of routing, avoidance of terrestrial transiting and minimization of transmission systems transited as well as TAT-9 would.

52. In view of the foregoing, we conclude that construction of the TAT-9 cable is the best of the available options for providing terrestrial digital connectivity to the Mediterranean area optical fiber cable systems. It is doubtful that capacity could easily be made available in TAT-8 for use with a TAT-8 spur to Spain which would be sufficient to match the use of cable capacity to Spain and other Mediterranean area countries currently projected by the USISCs and other telecommunications entities for more than a limited time. Moreover, as described above, provision of a Spain spur for TAT-8 would reduce that cable's overall ability for self-restoration. TAT-9 does not suffer from either of these limitations. TAT-9 meets the concern expressed in our *TAT - 8 Authorization Order* with respect to our strong national interest in direct, secure transmission channels to Mediterranean Basin countries.

D. Quality of Service

53. *Media and Route Diversity*. We have previously found that increasing route and media diversity in order to strengthen service reliability is of decisional significance.[47] In the NPRM we tentatively concluded that the proposed introduction of TAT-9 in 1991 would enhance both media and route diversity. According to AT&T's data on media diversity, with the introduction of TAT-9 in 1991, 55% of IMTS traffic would be routed via cable and 45% via satellite. This percentage would remain relatively constant for the duration of the planning period with 56% of IMTS circuits routed via cable in year 2000. AT&T also estimated that, with the introduction of TAT-9 in 1991, 73% to 85% of all IMTS circuits would survive a failure of the largest route to Belgium, France, Germany, Netherlands and the United Kingdom, which represents about 70% of the total IMTS circuit demand during the planning period. No party disputed AT&T's analysis. The record in this proceeding clearly establishes that both media and path diversity will be increased with the introduction of TAT-9. Accordingly, we affirm our decision in the NPRM that introduction of the TAT-9 cable system in 1991 will enhance media and path diversity.

54. PSI, however, believes that, in view of the diversity created by PTAT-1, the Commission should not rest its public interest determination to authorize construction of TAT-9 on the additional media and path diversity that will be provided by TAT-9. PSI argues that PTAT-1 can create the same degree of diversity. The USISCs maintain that their TAT-9 cable, with its design and configuration of five landing points, provides unprecedented networking flexibility which the PTAT-1 cable is not designed to accommodate. The USISCs contend that PTAT-1, with its three landing points, does not, and cannot, provide a direct link to France or Spain that is provided with the networking flexibility available with TAT-9.

55. Both PTAT-1 and TAT-9 offer additional diversity. However, we note that the capacity of private systems is a supplement to, and not a substitute for, common carrier capacity. Therefore, they are not fungible. PTAT-1 was never intended to supplant planned common carrier cable systems. Further, in authorizing PTAT-1, it was made clear that the cable would not be considered as part of this proceeding or within the NACP and that carriers which propose to acquire capacity in private systems would be required to seek Section 214 authority before acquiring capacity and providing service over the cable.

56. *Restoration of the TAT - 8 Cable* : We tentatively concluded in the NPRM that the proposed introduction of TAT-9 would provide a viable restoration alternative for TAT-8 and other facilities. Comsat maintained that there is adequate capacity in the INTELSAT system to accommodate full restoration of the TAT-8 cable system. After reviewing each plan, we stated that absolute reliance on satellite facilities to meet increased demand and restoration needs during the planning period may not be in the best interests of users who may have specific communications requirements that may best be accommodated via fiber optic cable facilities. Although we realized that satellite restoration would initially be used for TAT-8, we believed that it was reasonable to seek fiber optic restoration alternatives as the amount of traffic routed over this cable increases.

57. Comsat disagrees with the USISCs' suggestion that fiber optic technology may have some features that could make repeated restoration by satellite unattractive to users. Comsat states that current technology involving forward error correction allows satellite facilities to achieve the same level of error-free digital transmission rates as fiber optic cables. Comsat notes that while there are some distinctions between the two media with respect to delay, Integrated Switched Digital Network (ISDN) protocol development is evolving at the National Bureau of Standards that will render digital communications insensitive to any differences in delay. Comsat also asserts that although satellite service is minimally susceptible to atmospheric interference, cable has shown that it is prone to the effects of natural and man-made disasters, such as undersea earthquakes, fishing trawlers and sharks. Thus, Comsat maintains that satellite is a satisfactory medium for restoring cable.

58. PSI argues that TAT-9 is not necessary to restore communications on TAT-8 because PTAT-1 can provide that capacity. PSI states that it made a formal and detailed proposal to AT&T for mutual PTAT-1/TAT-8 restoration.

59. We agree with Comsat that satellite provides a satisfactory restoration alternative for cable. Indeed, satellite will initially be used to restore TAT-8. Nevertheless, we conclude that it is necessary and reasonable to seek fiber optic restoration alternatives as the amount of traffic routed over this cable increases. The need for terrestrial digital restoration for TAT-8 is even more compelling in light of DoD's substantial digital circuit requirements which were not included in the USISCs traffic forecast. DoD has indicated that some of its requirements will be routed via cable for technical reasons. Based on the assumption that DoD will route at least fifty percent of its requirements over digital cable facilities, we conclude that the proposed introduction of TAT-9 would provide a necessary restoration alternative for TAT-8 and other facilities. While common carriers may use private cable facilities for restoration of TAT-8, there is no basis on the record for us to determine which alternative is least costly. Therefore, there is no basis to conclude that restoration via PTAT-1 offers any particular cost advantage over TAT-9.

E. COST

60. In the NPRM we examined the cost information provided by the USISCs and Comsat in response to questions set forth in Appendix A and Appendix B of the Fourth NOI. Appendix A requested the USISCs and Comsat to, *inter alia*, estimate the respective original capital costs of cable and satellite facilities that could be made available for North Atlantic service during the planning period. Appendix B requested the USISCs and Comsat to provide the estimated total cost for each alternative plan submitted.

61. In response to Appendix A, the USISCs projected the cost of the TAT-9 system to be400 million based on 1987 price levels, excluding land and buildings. The USISCs projected the cost of land and buildings to be5 million. In addition, interest during construction for the USISCs was estimated at48 million or 14 percent of the USISCs' investment. The USISCs stated that their joint ownership interests would be 40.2 percent[48] in the cable itself (excluding cable stations).

62. The cost information provided by the USISCs in response to Appendix B employed the use-related cost methodology which examines and quantifies the expenditures that the USISCs will incur over the planning period. The USISCs noted that these costs include investment costs for new cable facilities and capital additions to existing cable and earth station facilities, O&M costs for facilities owned by service carriers, lease costs to obtain INTELSAT space segment and IRU capital and O&M costs for transit facilities as well as lease charges for transit facilities not owned by the carriers.[49]

63. Comsat, in its response to Appendix A, provided the original capital costs of all spacecraft, existing and planned, expected to be in operation during the planning period. Comsat noted that only the FOS would involve additional capital costs during the planning period since the INTELSAT V, VA and VI satellites have already been authorized.[50]

64. Based on the information submitted by the USISCs and Comsat, we stated that we could not reach any definitive conclusions with respect to the relative costs of each plan. We noted that the information provided by the USISCs and Comsat did not enable any of them to perform the type of cost analysis requested by the Fourth NOI.[51]

65. In response to the NPRM, Comsat provided additional cost information with respect to O&M costs, INTELSAT VA and VI launch costs and launch insurance

costs. Comsat also provided information concerning the latest information available from INTELSAT on the cost of FOS. Comsat costs for satellite facilities are grouped into three categories: (1) committed programs (satellites in service prior to 1991); (2) incremental facilities (satellites entering service from 1991-2000); and (3) O&M expenses between 1991 and 2000. Comsat states that only the incremental facilities costs and O&M expenses are relevant for its alternative Plans in the time period set forth in the Fourth NOI. Comsat notes that costs for committed programs, (*i. e.*, the INTELSAT VA and VI satellites launched prior to 1991) are not included because they are sunk and cannot be avoided in any of the plans. Included among the costs of satellites entering service from 1991 to 2000 are costs associated with the INTELSAT VI (F-1), as well as, the appropriate number of FOS for each plan. Comsat included the costs for INTELSAT VI (F-1) because its launch is currently planned for January 1991, although it notes that nearly all progress payments will have been paid. Comsat states that these assumptions are generally the same as those provided in its initial response to Appendix B, with the major exception being the inclusion of the INTELSAT VI (F-1) along with the FOS in "defining" incremental facilities.[52]

66. We have previously recognized that comparisons of statistical data and accounting information are useful for detecting and explaining similarities and differences among plans. One means of achieving comparability is to require all entities to use identical accounting methods and to report the information in identical format, both in terms of quantitative and qualitative measures.[53] In this proceeding we have attempted to obtain information in a manner that would permit a meaningful comparison of the various plans submitted. However, because both the USISCs and Comsat rely on different sets of economic support elements and costing bases, we are unable to arrive at meaningful conclusions and findings with respect to the relative costs of each of the alternative plans. For example, AT&T employs the use-related cost methodology while Comsat relies on the investment-related cost methodology. Each methodology relies on different assumptions. AT&T's costs include investment costs and expenses related to all facilities used during the planning period. Comsat's cost methodology only includes investment costs and expenses related to incremental facilities which become operational during the planning period and whose investment costs have not been incurred prior to the planning period.

67. PSI argues that the USISCs failed to provide the investment related cost information that we requested in the NPRM. However, we need not make a finding as to the relative costs of the plans submitted by Comsat and the USISCs in order to conclude that the USISCs should be permitted to introduce TAT-9 as early as 1991. We have found that introduction of TAT-9 as early as 1991 is required to satisfy a significant demand for digital cable facilities which cannot be satisfied by authorized digital cable facilities. Moreover, we have concluded, *interalia*, that TAT-9: (1) is the best alternative for providing digital connectivity with the Mediterranean region; (2) provides a necessary source of restoration for TAT-8; (3) enhances both media and path diversity; and (4) promotes international comity. In light of these conclusions, the fact that the USISCs did not provide the investment related cost information as requested in the NPRM does not cause us to alter our ultimate conclusion in this proceeding that the introduction of TAT-9 as early as 1991 is in the public interest, particularly where the Comsat alternative plans do not contemplate the introduction of additional cable facilities during the planning period.

68. The comments submitted in response to the NPRM provide some information as to the relative costs of similar capacity in the TAT-9 and PTAT cables. PSI states that the costs of acquiring a DS3 (45 Mb/s) channel in the PTAT-1 cable will be25 million. PSI argues that this cost is substantially cheaper than its calculated cost of37.7 million for similar capacity in TAT-9. In response, the USISCs argue that the actual cost of acquiring a DS3 channel in the United States-United Kingdom branch of TAT-9 is14.1 million. The USISCs state that the cost for similar capacity in the U.S.-France and U.S.-Spain branches of TAT-9 would be17.3 million and 19.2 million respectively. PSI has pointed out that the ultimate cost of PTAT-1 capacity could be affected by several factors, such as fluctuations in exchange rates, interest and inflation rates. Because these factors would affect the cost of PTAT-1 as well as TAT-9 capacity we will make no conclusion with respect to the relative costs of capacity in each system.

F. Portugal Landing Point

69. The NPRM raised the possibility of Portugal being included as a sixth landing point in the ultimate design of the TAT-9 cable. We noted that the Embassy of Portugal, in a memorandum forwarded through DOS, cited the potential advantages of a Portugal landing point such as increased routing diversity and a reduction in the overall investment of TAT-9 owners. DoD's comments also supported a Portugal landing point for diversity and restoration purposes. The USISCs, however, argued that a Spain landing point is critical for digital connectivity with the Mediterranean and that inclusion of a second TAT-9 Iberian landing point was considered and found not to be "feasible" because the European parties could not agree to such a configuration. We requested further comment from the USISCs on the specific issues raised by the Embassy of Portugal and DoD and the desirability and consequences of a Portugal landing point via the TAT-8 spur.

70. As the USISCs point out in their initial comments, there has been a recent announcement by the Companhia Portuguesa Radio Marconi (CPRM) of plans to construct a new digital fiber optic cable system, the TAGIDE-2 Cable System, between Portugal and France with possible extensions to the United Kingdom and Morocco.[54] The USISCs state that this cable meets the needs of the Portuguese administration by introducing fiber optic digital capabilities to Portugal within the framework of the facilities plan that has been accepted by the other members of the European telecommunications community. The separate cable would allow connection of both TAT-8 and TAT-9 to Portugal, via France, and would offer an alternative route in the event of a failure of either the France or the Spain branches of TAT-9.

71. Portugal's commitment to participate in the TAGIDE-2 cable appears to be a viable alternative to its inclusion as a sixth landing point country for TAT-9. Indeed, with the capability of TAGIDE-2 to connect Portugal with both TAT-8 and TAT-9 through France, it would appear that the purposes served by a TAT-9 landing point in Portugal would also be served by TAGIDE-2. Also, DoD's concern that a Portugal landing point would provide increased diversity would appear to be satisfied by

TAGIDE-2. In view of these circumstances, we conclude that the USISCs should not be required to pursue this matter further with the other TAT-9 co-owners.

G. Correspondent Acceptance

72. We affirm our tentative conclusion in the NPRM that the USISCs' plan is preferred from the standpoint of correspondent acceptance and that the TAT-9, MAT-2 and EMOS-1 cables should be fully coordinated. In the NPRM we pointed out that the TAT-9 C&MA was signed by twenty-five parties who preferred the USISCs' plan and endorsed the timely introduction of the cable in 1991 in order to be coordinated with the MAT-2 and EMOS-1 cable systems.

73. PSI maintains that even if TAT-9 promotes international comity, this factor should not be decisive. PSI argues that promotion of international comity is the only public policy objective that would be furthered by the Commission's approval of TAT-9 as proposed. PSI believes that it would be unlawful and improper for regulatory policy to be dictated solely by the interests of a few foreign telecommunications Administrations. As we have concluded earlier in this order, there are several other factors that support introduction of a TAT-9 optical fiber cable system in 1991. Foreign correspondent acceptance is but one of those factors. In the NPRM we noted that correspondent acceptance is an important factor in considering facility alternatives. We conclude that the USISC's Plan which proposes introduction of TAT-9 in 1991 is preferred from the standpoint of correspondent acceptance and that the TAT-9, MAT-2 and EMOS-1 cables should be fully coordinated.

H. Competitive Considerations

74. In the NPRM we tentatively concluded that introduction of TAT-9 in 1991 would further increase intermodal and intramodal competition. We have previously recognized that enhancing both intermodal and intramodal competition can be expected to spur providers of both international satellite and cable services to keep their services innovative and their prices low.[55] In reaching this decision, we rejected the arguments of PSI and PAS that their private systems should be considered in the facilities planning process. Although these systems were intended to introduce intramodal and intermodal competition with common carrier cable facilities, we noted that private transmission systems were authorized as alternatives to, and not substitutes for, common carrier transmission systems.

75. PSI contends that the availability of alternative transmission facilities should be considered as external marketplace realities in the North Atlantic planning process. PSI urges the Commission to consider the availability of PTAT-1 capacity in this context in determining the public necessity for introduction of TAT-9. PSI states that consideration of PTAT-1 capacity will ensure that the Commission (1) takes account of the potential impact on the public of introducing additional and premature rate-based transatlantic facilities, and (2) recognizes the ability of other fiber optic systems to meet the non-demand-related TAT-9 policy objectives identified in the *Third NPRM*. If its capacity is not considered, PSI argues that other carriers will have the incentive to utilize carrier-owned cables instead of PTAT-1, thereby preventing PTAT-1 capacity from being considered in future North Atlantic facilities planning proceedings. In the event that TAT-9 is authorized, PSI requests that we take steps to ensure that TAT-9 is separated structurally from AT&T and that TAT-9 is not cross-subsidized from domestic and international rate base customers. In order to prevent cross-subsidies, PSI recommends that a two-tiered scheme be instituted by the Commission in which: (1) TAT-9 would be operated by the carriers as an enterprise, separate from their domestic and international communications services; and (2) the current "rate of return regulation" should be replaced with a system designed to effectively control prices charged by the dominant carrier for all domestic and international services.

76. The USISCs state that the result of PSI's position would be to eradicate any intramodal competition between private cable systems and common carrier cable systems. PSI's cables, they assert, would be the only source of additional cable capacity for both private and common carrier use. The USISCs argue that this result is directly at odds with the Commission's stated objectives of increasing user alternatives through intramodal competition between private and common carrier cables in the authorization of private cable systems. The USISCs also point out that PSI, in the cable landing license applications for the PTAT-1 and PTAT-2 cables, represented that it was not and did not envisage requesting that common carriers be compelled to use capacity in the PTAT-1 and PTAT-2 cable systems. Comsat also agrees with our tentative conclusion to exclude private facilities such as PAS from the planning process. Comsat asserts that PAS has not raised any new arguments to justify a reversal of this policy.

77. We disagree with PSI that the introduction of TAT-9 should be delayed in view of the availability of PTAT-1. First, as discussed above, TAT-9 affords the North Atlantic region increased media and path diversity, direct digital connectivity with the Mediterranean cable systems, advanced technology, and foreign correspondent acceptance. Thus, we conclude that TAT-9 is an appropriate facility for meeting North Atlantic telecommunications needs and is therefore in the public interest. Second, PTAT-1 was never intended to supplant planned common carrier cable systems. In authorizing PTAT-1, we emphasized that our consideration of common carrier use of private cable facilities would focus on the potential that such usage could have to divert traffic from existing or planned common carrier facilities. We did not suggest that we would consider private facilities as a substitute for planned common carrier facilities.

78. PTAT-1 was authorized as a private cable system which was primarily intended for use by customers with bulk capacity or special service needs.[56] It was made clear that the licensee's investments in the cable system would be at its own risk without any guarantee of traffic.[57] It was further made clear that the cable would not be considered as part of this proceeding or within the NACP since no common carrier had stated plans to use the proposed private cable system.[58] Instead, we said that carriers which propose to acquire capacity in private systems would be required to seek Section 214 authority before acquiring capacity and providing service over the cable. In addition, we said that we would consider the potential effect of traffic diversion away from existing or planned satellite or cable common carrier facilities in the application process. Specifically, we stated that " . . . if common carriers seek to divert major amounts of traffic from existing transmission facilities, we can take any steps necessary at that time to determine whether significant economic harm to com-

mon carriers owning and using existing cables would occur and would be contrary to the public interest."[59] Finally, we said that common carrier use of private cable systems could be considered within the NACP to the extent that such use is proposed.[60]

79. We affirm our tentative conclusion that private, non-common carrier facilities should not be considered in the North Atlantic facilities planning process at this time. In the NPRM we noted that there was not sufficient information pertaining to planned common carrier use of private facilities or the extent of such use to warrant consideration of such facilities in the planning process. PSI has not demonstrated a change in circumstances to warrant inclusion of its facilities. We are unpersuaded by PSI's argument that our policy would allow the carriers to control the continued exclusion of PTAT-1 capacity from the Commission's future North Atlantic planning process by simply not forecasting use of that capacity. As we stated in the NPRM, we envisaged that private systems would compete with common carrier systems and afford certain benefits to the public as a result of such competition. We also recognized that common carrier use of these private systems could not be guaranteed. PSI was aware, from the beginning, that use of its system by common carriers would be voluntary.[61] There is no basis to effectively mandate such use by delaying the introduction of planned common carrier facilities which are clearly required for independent reasons and are in the public interest. Our policy has been and continues to be that private systems succeed or fail on their own merits and not through Commission action that would guarantee common carrier use of these systems.

80. We also reject PSI's suggestion that a separate subsidiary needs to be formed in conjunction with TAT-9. We have never imposed structural separation requirements in connection with common carrier ownership of transmission capacity to provide basic services. Moreover, any potential for anticompetitive pricing of TAT-9 capacity by AT&T can be dealt with in the context of our current regulatory framework. As for replacing rate of return regulation with a system designed to control prices, we note that this issue is the subject of a separate proceeding.[62]

81. PAS contends that we should consider its facilities in this proceeding because: (1) its application to operate its six Ku-band transponders for U.S.-European service has been authorized; (2) the Commission should assume it will be able to successfully consult its North Atlantic facilities under Article XIV(d) of the INTELSAT Agreement; and (3) it can offer services other than those connected to the public switched network.

82. We are unpersuaded that PAS's facilities should be considered in the North Atlantic planning process at this time. In the NPRM we noted limitations on the potential use of PAS's facilities. Among those limitations cited were PAS's lack of authority to provide U.S.-Europe service and the need to complete INTELSAT Article XIV(d) consultation. However, our reference to these limitations was not intended to suggest that we would consider PAS's facilities in the planning process in the event that these limitations could be overcome. Rather, our reference to such limitations was an indicator of the unlikelihood that such facilities would be used for significant common carrier traffic. Thus, even if the limitations cited did not exist, there still would be no basis at this time for considering PAS's system absent evidence of significant planned common carrier use.

83. In addition, by approving the introduction of TAT-9, we are not placing private satellite systems outside of the group of facilities used by U.S. and CEPT carrier entities. As with private cable systems, U.S. common carriers may seek authority to use private satellite systems consistent with restrictions placed on these systems.

I. Other Issues

84. In the NPRM we noted that past fiber optic cables such as TAT-8 and TRANSPAC-3 were finally authorized based in substantial part on these facilities being built by U.S. firms. We requested the USISCs to provide more specific data on the allocation of the various segment and subsegment construction contracts. In response to our inquiry, the USISCs state that the TAT-9 Procurement Group had released requests for quotation to suppliers in the U.S. (AT&T), the United Kingdom (Standard Telephone and Cables) and France (SUBMARCOM).[63] The USISCs state that contracts for the supply of Segment F are scheduled to be awarded in September 1988. Because of the September 1988 award date, the USISCs state that they do not yet know how much of Segment F will be awarded to each of the bidders. However, they expect that AT&T will be awarded the contract for that portion of the system that extends from the United States and Canada to a mid-Atlantic point of the TAT-9 system.

85. Although no final decision has been made with respect to the contract award for Segment F, we would expect that U.S. firms will participate in the construction of this segment. As we noted in the NPRM, U.S. firms have been chosen to participate in the construction of two previously authorized fiber optic cables (TAT-8 and TRANSPAC-3). Based on this history, and the USISCs statements on this issue, it appears that U.S. firms will participate in the construction of Segment F of TAT-9. We will monitor this situation and we direct the USISCs to notify us once the Segment F contracts have been awarded.

86. In response to our inquiry in the NPRM on excess capacity, the USISCs state that there is no excess capacity in TAT-9. According to the USISCS, since the NOI phase of this proceeding, new parties have joined the TAT-9 C&MA.![64] In addition, the USISCs note that existing owners have increased their ownership interests to meet their forecasted requirements. Thus, as of December 10, 1987, the USISCs state that the entire transatlantic design capacity of TAT-9 has been fully assigned between existing TAT-9 owners and between an existing owner and future owners or IRU holders. In the latter case, the USISCs point out that the capacity for future owners or IRU holders is held in the appropriate capacity pools and that additional requirements may be satisfied from reassignments of the aforementioned capacity categories.![65] In light of the full assignment of TAT-9 capacity, there is no issue of excess capacity and how it should be allocated.

87. Finally, we have insufficient information before us to reach any conclusion on the number or type of FOS to be deployed during the planning period. Based on INTELSAT's "Nominal Satellite Deployment Plan" it appears that two FOS will be needed in the POR to replace the INTELSAT VA-10 and VA-11 spacecraft which reach their end of design life in 1992 and 1993, respectively. The situation in the AOR is not as clear. While we reach no conclusion on the number or type of FOS to be deployed in the AOR during the planning period, we expect that INTELSAT, in reaching a final decision on follow-

on-satellites, will take into account the amount of capacity that will exist in the region with the introduction of TAT-9 in 1991.

III. SUMMARY

88. We conclude that the USISCs' plan, which proposes construction of the TAT-9 digital, fiber optic cable linking the U.S., Canada, the U.K., France and Spain for operation as early as 1991, will best serve the public interest in meeting the telecommunications needs of the North Atlantic during the 1991-2000 planning period. The TAT-9 cable will satisfy the USISCs' and DoD's requirements for digital cable facilities. It will also provide digital connectivity with the Mediterranean cable systems thereby establishing an integrated digital fiber optic network between North America and the Mediterranean area. TAT-9 will enhance media and path diversity and will provide a reliable method of restoration for TAT-8 and other facilities, including the capability for self-restoration of the French leg of the TAT-8 cable. TAT-9 further promotes our objective of increasing competition in the North Atlantic region and promotes international comity.[66]

89. We also conclude that there is no present basis for consideration of private facilities in the North Atlantic planning process. Although these systems were intended to introduce a meaningful level of intramodal and intermodal competition with common carrier facilities, we note that private transmission systems were authorized as alternatives to, and not substitutes for, common carrier transmission systems. Thus, absent evidence of significant common carrier use of such private systems, there is no basis for their consideration in this proceeding.

IV. ORDERING CLAUSES

90. Accordingly, IT IS ORDERED, Pursuant to Sections 4(i), 4(j), 201-205, 214 and 403 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 154(j), 201-205, 214, 303(r) and 403 (1976) that we adopt the following policy guideline for the North Atlantic region:

> We find that a TAT-9 digital fiber optic submarine cable, as described in paragraph 3, with a ready for service date as early as 1991, is in the public interest.

91. IT IS FURTHER ORDERED that PSI's request to file a response to the reply comments of the USISCs is DENIED.

92. Pursuant to Section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. Section 605, IT IS ORDERED, that Sections 603 and 604 of the Act do not apply because the policy guidelines adopted herein is a rule of particular applicability and economic impact on AT&T and other members of USISCs which are not small entities, and is, hence, not subject to the Regulatory Flexibility Act.

93. IT IS FURTHER ORDERED that CC Docket 79-184 remains open for additional proceedings upon further order of the Commission.

94. IT IS FURTHER ORDERED that the Secretary of the Commission shall cause a summary of this Report and Order to be published in the Federal Register and shall mail a copy of this decision to the Chief for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

TABLE 1

USISCs U.S.-CEPT CIRCUIT FORECAST (MAY 1987)

	IMTS	non-IMTS	Total	IBS (64 Kbps)
1987	19157	2329	21486	657
1988	21626	2752	24378	963
1989	24045	3139	27184	1175
1990	26959	3537	30496	1360
1991	30007	4054	34141	1558
1992	34232	4538	38770	1657
1993	39187	5051	44238	1739
1994	44813	5590	50403	1815
1995	51204	6146	57350	1911
1996	58419	6736	65155	2000
1997	66604	7424	74028	2087
1998	75869	8175	84044	2153
1999	86749	8960	95709	2271
2000	98767	9832	108599	2401

USISCs: AT&T, FTCC, HTC, ITT, MCII, RCA, TRT, US Sprint, WU.

TABLE 2

COMPARISON OF U.S. AND CEPT DELEGATION FORECASTS

NUMBER OF EQUIVALENT VOICE CIRCUITS

FORECAST	1987	1990	1995	2000
USISCs 5/87 Forecast	21,486	30,496	57,350	108,599
U.S. 11/87 NACWG Meeting Forecast	23,240	36,938	66,295	118,293
CEPT 11/87 NACWG Meeting Forecast	22,930	36,454	64,050	107,908

TABLE 3

PROJECTED DEMAND OF DIGITAL CABLE FACILITIES (64 Kbps Bearer Circuits)

	I					
	1989	1990	1991	1992	1993	1994
(a) U.S. Ownership in TAT-8	7274	7274	7274	7274	7274	7274
(b) USISCs' Demand	2223	2928	4472	5848	7271	8569
(c) DoD's Demand [1]	595	774	952	1130	1309	1488
(d) Total	2818	3702	5424	6978	8580	10057
(d) % (a)	37.8	50.9	74.6	95.9	118	138

[1] Use 1190 64 Kbps circuits for year 1989 as a base, assuming DoD's requirement will quadruple over the next 10 years, and place 50% of its requirements on cable facilities.

FOOTNOTES

[1] *Policies for Common Carrier Facilities in the North Atlantic Region,* 2 FCC Rcd 2088 (1987).

[2] North Atlantic Facilities Planning, 3 FCC Rcd 775 (1988), 53 Fed. Reg. 2285 (January 27, 1988).

[3] The USISCs are the United States common carrier entities which provide international telecommunications services directly to the public. The USISCs who have filed joint comments and responses in this proceeding are: the American Telephone and Telegraph Company (AT&T); FTC Communications, Inc. (FTCC); MCI International, Inc. (MCII); RCA Global Communications, Inc. (RCA Globcom); TRT Telecommunications Corporation (TRT); US Sprint Communications Company (US Sprint); WU World Communications Inc. (WU Worldcom, formerly ITT World Communications Inc.), and The Western Union Corporation (WU, formerly The Western Union Telegraph Company).

[4] During preparation of the U.S. Submission to the May 28-30, 1986 North Atlantic Consultative Working Group (NACWG) meeting, AT&T disclosed that a TAT-9 cable ready for service as early as 1991 was under consideration. At the May 28-30, 1986 NACWG meeting, it was disclosed that AT&T, Teleglobe Canada (Teleglobe), British Telecommunications plc (BT), Secretariat D'Etat aux Postes et Telecommunications, Republic of France (FPTT) and Compania Telefonica Nacional De Espana (Telefonica) had signed on May 21, 1986 an "Agreement to Plan and Implement TAT-9" which contemplated the construction of a digital, optical fiber TAT-9 cable system ready for service as early as 1991.

[5] *Regulatory Policies and International Telecommunications,* 2 FCC Rcd 1022 (1987).

[6] Joint Supplemental Comments of Comsat and AT&T, CC Docket No. 87-67, filed October 9, 1987.

[7] On April 14, 1988, the Commission released its Order in Docket No. 87-67 in which it decided to end all circuit distribution guidelines placed on the circuits used by AT&T for the provision of international message telephone service (IMTS) and 800 service-overseas. In the decision, the Commission approved an Agreement between AT&T and Comsat that was intended, by AT&T and Comsat, as a replacement for Commission imposed circuit distribution guidelines. The Agreement established: (1) a set of commitments relating to AT&T's worldwide use of Comsat's INTELSAT space segment capacity for IMTS circuits activated through 1994, and (2) a framework for discussions and exchanges of information that will provide a basis for AT&T's further use of Comsat's INTELSAT space segment capacity after 1994. In the Matter of Policy for Distribution of United States International Carrier Circuits Among Available Facilities During the Post-1988 Period, 3 FCC Rcd 2156, 53 FR 13270 (April 22, 1988). The Bureau had allowed Comsat's tariff submission that would implement the Agreement between Comsat and AT&T. Communications Satellite Corporation, Transmittal No. 674, 3 FCC Rcd 1132 (released February 17, 1988).

[8] *North Atlantic Facilities Planning,* 3 FCC Rcd at 775.

[9] *Id.* at 784.

[10] *Id.* at 785.

[11] The proposed MAT-2 cable system consists of a fiber optic cable that extends from Conil, Spain to Palermo, Italy. The EMOS-1 system is a fiber optic cable that will connect Italy with Greece, Turkey and Israel. The USISCs state that digital connectivity with these systems via the TAT-9 fiber optic cable will establish an integrated digital network that extends from North America to the Mediterranean.

[12] The USISCs filing joint comments on February 16, 1988 include AT&T, FTCC, MCII, RCA Globcom, TRT, US Sprint, WU Worldcom and WU.

[13] Comments of the United States International Service Carriers, February 16, 1988, page 18.

[14] The announcement was made by Companhia Portuguesa Radio Marconi (CPRM) at the opening of the North Atlantic Consultative Process (NACP) Senior Level Meeting held in Estoril, Portugal, January 20-22, 1988.

[15] The USISCs note that the additional cost of a TAT-8 spur is estimated at75 million compared to the59 million estimated cost of the TAT-9 Spain branch which will provide higher capacity, more flexibility and newer technology.

[16] The USISCs state that capacity held in capacity pools is not excess capacity or spare capacity. They state that the pools were created for each subsegment of the cable to accommodate entry of new parties that want to acquire capacity on an IRU or ownership basis.

[17] *See* n. 7.

[18] Comments of Comsat, February 16, 1988, Appendix A.

[19] Comments of PSI, Inc., February 16, 1988, Exhibit 1.

[20] PAS cites a February 8, 1988, letter from then Under Secretary of Commerce for International Trade, Bruce Smart, stating that the CEPT countries are engaging in a refusal to deal with U.S. separate satellite systems. Comments of PAS, February 16, 1988, page 3.

[21] 3 FCC Rcd at 779 (1988).

[22] Economists Incorporated, INTELSAT Pricing and Costing for PDS Service, at iii (November 20, 1987). One conclusion from this study is that INTELSAT has imprudently built and then launched unneeded capacity. The U.S. ratepayers will bear the burden of paying for a significant portion of this excess capacity.

[23] In their first round of comments to the NPRM, the USISCs asserted that DoD's projected circuit requirements were never included in their projected traffic forecast submitted in response to the Fourth NOI. DoD initially argued that its projections were included in the USISCs' forecasts but were not identified as such. In a March 18, 1988, letter to the Commission, DoD clarified its position on whether its circuit requirements were included in the USISCs' traffic forecast.

[24] The USISCs jointly submitting reply comments include AT&T, FTCC, MCII, RCA Globcom, TRT, US Sprint, WU Worldcom and WU.

[25] *Tel-Optik Limited (Private Submarine Cable decision)*, 100 FCC 2d 1033 (1985).

[26] *See* Reply Comments of the USISCs, March 2, 1988, page 9.

[27] *In the Matter of Amendment of Section 64. 702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 77 FCC 2d 384 (1980), *aff' d on recon.*, 84 FCC 2d 50 (1980), *aff' d on further recon.*, 88 FCC 2d 512 (1981), *aff' d sub nom. CCIA - v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied sub nom., Louisiana P. S. C. v. United States*, 461 U.S. 938 (1983).

[28] On March 29, 1988, PSI requested permission to file a response to the reply comments of the USISCs. PSI also submitted a copy of the proposed response with its request. PSI states that its additional pleading should be permitted in order for it to correct what it perceives to be factual misstatements by the USISCs in their reply comments. The USISCs filed an opposition to the request on the basis that PSI's proposed response merely reiterates its earlier position. PSI filed a reply to the USISCs' opposition. After review of PSI's request, proposed response and reply, we find that the arguments contained therein are already adequately set forth on the record and add no additional information. Accordingly, we deny PSI's request.

[29] *See* n. 7.

[30] 3 FCC Rcd at 785.

[31] While the TAT-8 co-owners considered a TAT-8 cable with three European landing points (United Kingdom, France and Spain), they agreed to construct TAT-8 with only two European landing points (United Kingdom and France). *See AT&T Co.*, 98 FCC 2d 440 (1984) (*TAT - 8 Authorization Order*). However, the TAT-8 Construction and Maintenance Agreement (C&MA) contains provisions which would permit the addition of a Spain landing point if appropriate agreements can be reached. *See* paragraphs 11(d) and 19 of Attachment B to the USISCs' TAT-8 application, File No. I-T-C-84-072. As there described, the Spain branch of TAT-8, should it be constructed, would utilize a branching unit in the France branch of TAT-8 to route the second fiber optic pair in that branch to Spain. The second fiber optic pair in the United Kingdom branch of TAT-8 could also be extended to Spain through the branching unit. *See* Attachment D of the USISCs' TAT-8 Application File No. I-T-C-84-072.

[32] *AT&T Co.*, 98 FCC 2d 440, 476 (1984).

[33] The French Telecommunications entity holds the other half interest in these circuits in the transatlantic and French branch portion of the cable.

[34] It is also theoretically possible that circuits in TAT-8, which the C&MA indicates are intended for use between the USISCs and the CEPT telecommunications entities which own the other half interest in those circuits, could be made available for use in a TAT-8 spur to Spain. However, such an eventuality would require the agreement of the CEPT entities owning the other half interest in those circuits to make their interest in some of the circuits available to telecommunications entities in Mediterranean region countries. A delay in the availability of a TAT-9 cable because of a decision to construct a TAT-8 spur to Spain would not seem likely to provide a positive incentive for the CEPT entities to dispose of TAT-8 capacity originally intended for use with the USISCs.

[35] One route for reaching IOR countries used by the USISCs is to utilize cable circuits between the United States and Europe and extend these circuits to IOR countries through the use of European earth stations and INTELSAT IOR satellites.

[36] The TAT-8 application indicates that these circuits would be routed via terrestrial facilities in France rather than via Spain to their destination countries. The USISCs and their correspondents may prefer to utilize this routing for these TAT-8 circuits even if TAT-9 provides a link to the Mediterranean optical fiber cables in order to maintain diversity of routing.

[37] Indeed, the USISCs may have already reached agreements with the telecommunications entities in the countries to which they propose to use some or all of these circuits, and the French interest in some of these circuits may have already been conveyed to those telecommunications entities.

[38] Of the 712 MAT-2 circuits the USISCs propose to acquire, 582 are to be used with named countries and 130 are to be used with countries to be specified in the future.

[39] The USISCs proposed use of these 1,703 is as follows:

For Use To	Number of Circuits
Spain	403
Points Reached via MAT-2	712
Unspecified	588

[40] The analysis we have conducted herein should not be construed as approval of the USISCs' ownership or any other form of acquisition of specific numbers of circuits in the MAT-2, EMOS-1, or TAT-9 cables, nor should our analysis be considered as precedent for future action on specific Section 214 applications which may be filed. We shall consider and decide issues pertaining to the amount of capacity to be acquired in a given cable, the overall ownership arrangements for the cable, as well as other relevant issues at the time we consider specific Section 214 applications before us.

[41] *See* 98 FCC 2d at 463-464.

[42] *See* 98 FCC 2d at 473.

[43] It must be noted that the failures of the traffic bearing fiber pairs which can be restored by the third fiber pair in the transatlantic portion of TAT-8 and in the United Kingdom and France branches must be of a type which do not affect the operation of the remaining fiber pairs. Obviously, a ship's anchor severing the cable would cause all fiber pairs in a given segment of the cable to fail.

[44] 98 FCC 2d at 464.

[45] 98 FCC 2d at 463.

[46] The specific locations of the cable terminals of the PTAT-1, United Kingdom-France-Portugal and United Kingdom-Netherlands cables in the United Kingdom, France, Portugal and the Netherlands are not on record with the Commission.

[47] *All American Cable and Radio, Inc., et al.*, 67 FCC 2d 451 (1978).

[48] According to the December, 1987 modified C&MA, the USISCs' ownership interest is 38.5%.

[49] The USISCs' costs were displayed separately for cable and satellite facilities and included total expenditures for each year. The USISCs estimated their total use-related cable costs incurred during the planning period to be440 million. Of this total,244 million is directly related to TAT-9 in the form of new cable

investment, investment in digital multiplication equipment, expenses and transit charges. The USISCs estimated their total use-related satellite costs to be990.9 million, resulting in total use-related cable and satellite costs of1,430.9 million.

[50] Comsat estimated INTELSAT's total system cost for FOS to be1,294 million, with Comsat's share of this cost dependent on its investment share in INTELSAT, which, at the time of the NPRM, was estimated at 25.6%. In its response to Appendix B, Comsat estimated INTELSAT's cost for FOS to be1,355.4 million under Plan 1, with Comsat's cost 347.4 million. Under Plan 2, INTELSAT's and Comsat's costs were estimated at 1,148.5 million and294.4 million, respectively. Plan 3 was estimated to cost INTELSAT938.6 million and Comsat240.6 million.

[51] *Fourth Notice of Inquiry (NOI), Appendix B,* 2 FCC Rcd at 2093-2094 (1987).

[52] With the inclusion of the INTELSAT VI (F-1) satellite, Comsat's estimated cost for Plan 1 is479.2 million, and408.7 million and 333.5 million, respectively, for Plans 2 and 3. The range in costs is attributable to the reduction of the AOR satellite configuration from six in Plan 1, five in Plan 2, and four in Plan 3.

[53] The concept of a standardized costing methodology was explored in the Pacific Facilities Planning NPRM, 89 FCC 2d 1205 (1982), 47 FR 21868 (May 20, 1982). However, we were unable to adopt a specific method. *See First Report and Order, Pacific Facilities Planning,* 52 RR 2d 1157 (1982), 47 FR 57040 (December 12, 1982).

[54] The announcement was made by CPRM at the opening of the NACP Senior Level Meeting held in Estoril, Portugal, January 20-22, 1988.

[55] *Authorized Entities and Authorized Users,* 4 FCC 2d 421 (1966), *recon. granted in part,* 6 FCC 2d 593 (1967) (Authorized User I). In 1982, we modified the Authorized User I decision to permit Comsat to provide space segment capacity directly to users and offer end-to-end services through a separate subsidiary, *Authorized User Policy,* 90 FCC 2d 1394 (1982) (Authorized User II). However, that decision was vacated and remanded by the court, *ITTWC v. FCC,* 725 F.2d 732 (D.C. Cir. 1984). After further proceedings mandated by the court, we essentially readopted our *Authorized User II Policy in Comsat,* 100 FCC 2d 177 (1985) (Authorized User III). This decision was affirmed by the court upon appeal, *Western Union International v. FCC,* 804 F.2d 1280 (D.C. Cir. 1986).

[56] PSI (formerly Tel-Optik) represented to the Commission that its " . . . principle purpose is to provide private users with high speed wideband capacity needs." It explained that its " . . . mention of the use of the facility by a common carrier was only to indicate that if any given common carrier had a need for bulk capacity and desired to negotiate an agreement for the purchase of such capacity, Tel-Optik would be prepared to negotiate." Tel-Optik Consolidated Reply Comments, P.4, dated November 15, 1984 (File Nos. I-S-C-L-84-002 and I-S-C-L-84-003).

[57] *Tel-Optik Limited (Private Submarine Cable Decision),* 100 FCC 2d 1033, at 1049 (1985).

[58] PSI opposed incorporation of its proposal into this proceeding and the Consultative Process. *See* November 15, 1984 Tel-Optik Consolidated Reply Comments at 2, 4, 11 and 13.

[59] Private Submarine Cable decision at 1048.

[60] Private Submarine Cable decision at 1049. On October 27, 1987, the Common Carrier Bureau authorized Allnet Corporation to acquire and operate 96 64-kbps half-circuits in the PTAT-1 cable system. The Bureau found that Allnet's proposed acquisition and use of PSI facilities would not result in significant economic harm to carriers owning and using existing transmission facilities nor would it impair services to the public. Furthermore, in view of the small number of circuits requested, it found that Allnet's proposal would have no effect on Commission consideration in Docket 79-184 of policy guidelines for authorization of new common carrier facilities to meet North Atlantic telecommunications needs during the 1991-2000 period. Therefore, the Bureau stated that Allnet's proposed use of PSI should not be considered in the context of this proceeding. *Allnet Communications Services,* 2 FCC Rcd 6633 (1987).

[61] In commenting on the applications for the private cable systems, AT&T requested the Commission to make it clear that it would not entertain a request by PSI to compel common carrier use of capacity. PSI responded that it " . . . has not so requested and does not envisage making such a request and thus [it] seeks no special treatment." PSI further stated that " . . . should any other common carrier desire to purchase capacity from Tel-Optik, the Commission should not prohibit such a transaction but should process the matter in accordance with appropriate FCC facility authorization procedures." Tel-Optik Consolidated Reply, comments at pages 8-9.

[62] Further Notice of Proposed Rule Making, Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, FCC 88-172 (released May 23, 1988).

[63] The TAT-9 Procurement Group is comprised of AT&T, British Telecom, France Telecom and Teleglobe, and is empowered to take all necessary actions related to the contracts for initial work and procurement. Telefonica is also a participant in those activities of the Procurement Group that involve the Spain branch.

[64] As noted in the NPRM, France and Germany signed the TAT-9 C&MA in July, 1987. In addition, the USISCs note that Overseas Telecommunications Commission of Australia, Hellenic Telecommunications Organization, S.A., Philippine Long Distance Telephone Company and the General Directorate of Turkish PTT joined on December 10, 1987.

[65] The USISCs state that the capacity held in the capacity pools is not excess or spare capacity. They note that the pools were created for each subsegment of the cable to accommodate entry of new parties and/or entities that may want to acquire capacity on an ownership or IRU basis. The USISCs state that the cost of the pool capacity is borne by the landing point parties (Pool Parties) prior to acquisition by new owners or IRU purchasers based on a fixed percentage corresponding to each Pool Party's projected initial capacity requirements for use between themselves and other parties not signatory to the May 11, 1986 Agreement to plan and implement TAT-9.

[66] We do not reach any conclusions in this proceeding on how traffic will be distributed over various North Atlantic transmission facilities. We note that this issue was decided in CC Docket No. 87-67. In the Matter of Policy for Distribution of United States International Carrier Circuits Among Available Facilities During the Post-1988 Period. *See* n. 7.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of Subpart H, Part 1
of the Commission's Rules and
Regulations Concerning
Ex Parte Communications and
Presentations in Commission
Proceedings

ORDER

Adopted: June 8, 1988; Released: June 24, 1988

By the Commission:

1. In this *Order*, we adopt, on our own motion, minor corrections and changes to our *ex parte* rules, as set forth below and in the Appendix. These rules were substantially revised last year pursuant to notice and comment Rule Making. *Amendment of Subpart H, Part 1 of the Commission's Rules and Regulations Concerning Ex Parte Communications and Presentations in Commission Proceedings*, 2 FCC Rcd 3011 (*Ex Parte Order*), *on reconsideration*, 2 FCC Rcd 6053 (1987) (*Ex Parte Reconsideration Order*). Because the corrections and changes herein are minor and relate to the Commission's rules regarding practice and procedure, we are dispensing with notice and comment pursuant to Section 553(b)(A) of the Administrative Procedure Act, 5 U.S.C. § 553(b)(A).

2. *Status Inquiries*. Under Section 1.1202(a) of our rules, status inquiries are deemed to be excluded from the definition of a "presentation," and therefore are not covered by the *ex parte* rules. By Public Notice dated October 30, 1987, the General Counsel issued an interpretation of Section 1.1202(a) of the *ex parte* rules regarding the treatment of status inquiries. Specifically, the Public Notice stated:

> [A]ny congressional or other communication expressing concern with administrative delay in a particular proceeding, or expressing concern that a particular proceeding be resolved expeditiously, should be treated as a status inquiry, and therefore excluded from the definition of presentation, *provided that* : (1) no view is expressed as to the merits or outcome of the proceeding; (2) no view is expressed as to a date by which the proceeding should be resolved; and (3) no specific reasons are given as to why the proceeding should be resolved expeditiously, other than the need to resolve administrative delay.

General Counsel Issues Interpretation of Section 1. 1202 of the Commission's Rules Regarding the Treatment of Status Inquiries Under the Ex Parte Rules, Mimeo No. 414 (Oct. 30, 1987). This interpretation set an appropriate balance between the need to prevent communications designed to affect the merits or specific timing of a proceeding and protection of the rights of Congress and others to make legitimate communications regarding administrative delay. In order to ensure that all parties are on notice of this interpretation, we are incorporating it into a Note to Section 1.1202(a).

3. *Exempt Proceedings*. Section 1.1204(a) of the rules sets forth a list of proceedings which are exempt from *ex parte* restrictions, for example, adjudicative proceedings not formally opposed, designated for hearing or involving mutually exclusive applications. Inadvertently, however, Section 1.1204 does not include a variety of proceedings which, under Sections 1.1206(b) and 1.1208(c)(1), are exempt until some triggering event (*e. g.*, the filing of a formal opposition) occurs. In order that a more comprehensive list of exempt proceedings be contained in a single place in our rules, we are adding reference in Section 1.1204(a) to additional exempt proceedings now listed in Sections 1.1206(b)[1] and 1.1208(c)(1).[2] In addition, we are amending Section 1.1204(a) to correct the description of when Freedom of Information Act (FOIA) request proceedings are exempt from the *ex parte* rules. To reflect our current treatment of FOIA request proceedings, *see* Section 1.1206(b)(9), Section 1.1204(a)(3) is being amended to provide that such proceedings are exempt not simply if no formal opposition has been filed but also only if the requested information is not the subject of a confidentiality request.

4. *Informal Objections*. The note to Section 1.1204(a)(3) ensures that in certain proceedings that become restricted upon the filing of a formal opposition or formal complaint, involve mutually exclusive applications, or have been designated for hearing, informal objectors will be treated the same for *ex parte* purposes as if they had filed formal oppositions. That is, *ex parte* presentations by informal objectors in such proceedings are prohibited. Just as this Note prevents someone from gaining more favorable *ex parte* treatment by filing an informal objection where a formal opposition would render a proceeding restricted, we believe it is appropriate to prevent someone from gaining more favorable treatment under the *ex parte* rules by filing an informal objection where a formal opposition (or request for hearing) would render a proceeding subject to permit but disclose rules. Accordingly, we are adding to new Section 1.1204(a)(11) a Note providing that, in the circumstances just described, any *ex parte* presentations by informal objectors are subject to the permit but disclose procedures that would otherwise be applicable under Section 1.1206 if a formal opposition (or request for hearing) had been filed. The formal party to the proceeding would, however, continue to be permitted to make *ex parte* presentations without disclosure until a formal opposition (or request for hearing) were filed.

5. *Miscellaneous Changes and Corrections*. In this *Order*, we are also correcting an error in our *Ex Parte Reconsideration Order*, in which we failed to incorporate in the Appendix the addition of Section 1.1208(c)(1)(ii)(D) and the Note thereto. We are also amending the Note now following Section 1.1204(a)(3) to eliminate reference to FOIA proceedings, which are properly dealt with in the new Note following Section 1.1204(a)(11), and to include a cross-reference to other proceedings that are exempt until they become restricted upon occurrence of one of the requisite triggering events. *See* para. 3 and note 2, *supra*. To reflect the elimination of FOIA proceedings from the Note now following Section 1.1204(a)(3), we are

also moving that Note so that it immediately follows Section 1.1204(a)(2). Finally, we note that we previously stated that Section 214(a) proceedings would be classified as Rule Makings rather than adjudications under the Administrative Procedure Act. Ex Parte Order, 2 FCC Rcd at 3019. This statement was incorrect, see ITT World Communications v. FCC, 595 F.2d 897 (D.C. Cir. 1979), and we take this opportunity to correct it. Such proceedings are properly classified as adjudications.

CONCLUSION

6. The changes we adopt today make minor clarifications and corrections to our ex parte rules in order to ensure that those rules best serve the public interest. Because these changes concern Commission practice and procedure and establish standards of fairness governing Commission proceedings, we find that it is appropriate to make the changes adopted herein effective immediately upon publication in the Federal Register. See 5 U.S.C. § 553(d).

7. The rules changes adopted herein have been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose no new or modified requirements or burdens on the public and, accordingly, their implementation is not subject to approval by the Office of Management and Budget under that Act.

8. Accordingly, IT IS ORDERED that the Rules and Regulations of the Federal Communications Commission ARE AMENDED in the manner indicated in the Appendix below, to BECOME EFFECTIVE IMMEDIATELY upon publication in the Federal Register.

9. Authority for this action is contained in Sections 4(i), 4(j) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), 154(j) and 303(r).

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

APPENDIX

Part 1 (Practice and Procedure) of Chapter 1 of Title 47 of the Code of Federal Regulations is amended as follows :

1. The authority citation for Part 1 continues to read:

Authority : Sections 4, 303, 48 Stat. 1066, 1082, as amended ; 47 U. S. C. 154, 303.

2. Section 1.1202 is amended by adding the following Note immediately following paragraph (a):

Section 1. 1202 Definitions

* * * *

(a) * * *

NOTE: Any congressional or other communication expressing concern with administrative delay in a particular proceeding or expressing concern that a particular proceeding be resolved expeditiously, will be treated as a status inquiry and therefore excluded from the definition of presentation, *provided that* : no view is expressed as to the merits or outcome of the proceeding; no view is expressed as to a date by which the proceeding should be resolved; and no specific reasons are given as to why the proceeding should be resolved expeditiously, other than the need to resolve administrative delay.

3. Section 1.1204(a) is amended by adding a comma and the phrase ",Section 1.1206 (Non-Restricted Proceedings)," immediately following the phrase "(Sunshine Period Prohibition)".

4. Section 1.1204 is amended by adding the phrase "or other proceeding specified in Section 1.1208(c)(1)(ii)" to paragraph (a)(1) immediately following the words "Section 1.1202(d)".

5. Section 1.1204 is further amended by removing the Note following paragraph (a)(3) and adding said Note immediately following paragraph (a)(2), amending said Note by adding the word "or" immediately following the words "subsection 1.1204(a)(1)", by deleting the comma following the words "subsection 1.1204(a)(1)", and by removing from said Note the words "or (a)(3),".

6. Section 1.1204 is further amended by adding the words "and where the requested information is not the subject of a request for confidentiality" to paragraph (a)(3), immediately following the word "opposed".

7. Section 1.1204 is further amended by adding new paragraphs (a)(7), (a)(8), (a)(9), (a)(10) and (a)(11), and a Note immediately thereafter, to read as follows:

Section 1. 1204 General Exemptions

(a) * * *

(7) A proceeding conducted pursuant to Section 220(b) of the Communications Act for prescription of common carrier depreciation rates prior to release of a public notice of specific proposed depreciation rates for a carrier or carriers.

(8) A petition or request for declaratory ruling unless a formal opposition has been filed.

(9) A rule making proceeding conducted pursuant to Sections 201(a), 213(a), 221(c) or 222 of the Communications Act or Sections 201(c)(2) or 201(c)(5) of the Communications Satellite Act of 1962, unless the proceeding has been formally opposed or has been set for investigation by the Commission.

(10) A proceeding under Section 221(a) of the Communications Act unless a formal request for hearing has been made by an entity specified in that Section.

(11) A proceeding under Section 214(a) of the Communications Act unless a formal opposition has been filed or the proceeding has been designated for hearing.

NOTE: In proceedings exempted by subsection 1.1204(a)(3), (a)(8), (a)(9), (a)(10), or (a)(11), oral ex parte communications without disclosure pursuant to Section 1.1206 are permissible, but only between the Commission and the formal party involved or his representative. Any informal objectors (whether their objections are oral or written) are subject to *ex parte* procedures set forth in Section 1.1206 requiring disclosure of such communications except where confidentiality is necessary to protect these persons from possible reprisals.

8. Section 1.1208 is amended by adding new paragraph (c)(l)(ii)(D) and a Note immediately thereafter, to read as follows:

Section 1. 1208 Restricted Proceedings

* * * *

(c) * * *

(1) * * *

(ii) * * *

(D) any request for an order to show cause, any special relief or waiver proceeding conducted pursuant to or under any of the provisions listed in Section 1.1208(c)(1)(ii)(A), (B), or (C), above or any cable television special relief or waiver proceeding.

NOTE: See Section 1.1204(a)(6) regarding the ex parte treatment of requests for waiver or special permission made in the context of a particular tariff filing as part of the tariff review process.

FOOTNOTES

[1] The following proceedings, now listed in Section 1.1206(b), are being added to the exemptions set forth in Section 1.1204(a): (1) a proceeding conducted pursuant to Section 220(b) of the Communications Act for prescription of common carrier depreciation rates prior to release of a public notice of specified proposed depreciation rates for a carrier or carriers; (2) a petition or request for declaratory ruling unless a formal opposition has been filed; (3) a rule making proceeding conducted pursuant to Sections 201(a), 213(a), 221(c) or 222 of the Communications Act or Sections 201(c)(2) or 201(c)(5) of the Communications Satellite Act of 1962, unless the proceeding has been formally opposed or has been set for investigation by the Commission; (4) a proceeding under Section 221(a) of the Communications Act unless formal request for hearing has been made by an entity specified in that section; and (5) a proceeding under Section 214(a) of the Communications Act unless a formal opposition has been filed or the proceeding has been designated for hearing. We are also making an additional minor correction to the introductory language to Section 1.1204 to reflect the addition of this category of proceedings.

[2] The following proceedings, now listed in Section 1.1208(c)(1), are being cross-referenced in the exemptions set forth in Section 1.1204(a), unless the proceeding is formally opposed or involves formal complaint, involves mutually exclusive applications, or has been designated for hearing: (1) any proceeding under Sections 206, 207, 208, 212, 214(d) or 224(b)(1) of the Communications Act; (2) any proceeding under Sections 201(c)(6), (7), (9) or 304(f) of the Communications Satellite Act of 1962; and (3) any request for an order to show cause, any special relief or waiver proceeding conducted pursuant to or under any of the provisions listed in Section 1.1208(c)(1)(ii)(A), (B), or (C), or any cable television special relief or waiver proceeding.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-267

In the Matter of

Amendment of Section 73.202(b), RM-6353
Table of Allotments,
FM Broadcast Stations.
(Vidalia, Louisiana)

NOTICE OF PROPOSED RULE MAKING

Adopted: May 12, 1988; Released: June 24, 1988

By the Deputy Chief, Policy and Rules Division:

1. At the request of John H. Pembroke (petitioner), the Commission considers herein a petition for rule making seeking the allocation of Channel 284A[1] to Vidalia, Louisiana, as that community's first local FM service. Petitioner states his intention to apply for the channel, if allotted.

2. Channel 284A can be allotted to Vidalia in compliance with the Commission's minimum distance separation requirements with a 1.0 kilometer (0.6 mile) site restriction northwest of the community.[2] The restriction is necessary to avoid a short spacing to Station WZFL-FM, Channel 284A, Centreville, Mississippi.

3. In view of the fact that Vidalia, Louisiana, could receive its first local FM channel the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Vidalia, Louisiana	---	284A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **August 15, 1988,** and reply comments on or before **August 30, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

John H. Pembroke
P. O. Box 22604
1816 Pleasant Avenue
Jackson, MS 39203
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Petitioner originally requested Channel 279A. However, that channel was in conflict with the proposed upgrade for Station KISY(FM), Tioga, Louisiana, from Channel 252A to Channel 278C2. Therefore, in order to avoid the conflict we have substituted Channel 284A for the originally requested channel at Vidalia. See MM Docket No. 88-47, 3 FCC Rcd 973 (1988).

[2] The restricted site coordinates are 31-34-20 and 91-25-51.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-328

In the Matter of

Amendment of Section 73.202(b), RM-5740
Table of Allotments,
FM Broadcast Stations.
(Senatobia, Mississippi)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: May 4, 1988; Released: June 27, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 2 FCC Rcd. 5204 (1987), proposing the allotment of FM Channel 229A to Senatobia, Mississippi, in response to a petition filed by Christian Impact, Inc. (petitoner). Comments were not received from the petitioner or any other party expressing an interest in the allotment at Senatobia.[1]

2. As stated in the *Notice*, a showing of continuing interest is required before a channel will be allotted. It is the Commission's general policy to refrain from making a new allocation to a community absent an expression of interest. Therefore, since there has been no such interest here, we will dismiss the petitioner's proposal.

3. Accordingly, IT IS ORDERED, That the petition of Christian Impact, Inc., requesting a channel allotment at Senatobia, Mississippi, IS HEREBY DISMISSED.

4. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

5. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] Comments and reply comments were filed jointly by Batesville Broadcasting Company and Charleston Broadcasting Company, Inc. Batesville Broadcasting Company requested the substitution of Channel 230C2 for Channel 240A at Batesville, a proposal which conflicted with the proposed allotment at Senatobia. To avoid the conflict, in MM Docket 88-14 we proposed allotment of Channel 263C2 at Batesville. *See Notice of Proposed Rule Making.*

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-445

In the Matter of

Amendment of Section 73.202(b),	RM-6007
Table of Allotments,	RM-6193
FM Broadcast Stations.	
(Hardeeville, South Carolina, and	
Pooler, Georgia)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: May 13, 1988; Released: June 27, 1988

By the Deputy Chief, Policy and Rules Division:

1. At the request of Benjamin M. Tucker, *et al.*, d/b/a Jessup Broadcasting Limited Partnership (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 2 FCC Rcd 6375 (1987), proposing the substitution of Channel 266C2 for Channel 266A at Hardeeville, South Carolina, and the modification of its permit for Station WWDR to specify the higher powered channel. Comments and reply comments were filed by the petitioner in which it reiterated its intention to apply for the channel, if allotted. In addition, comments and a counterproposal were filed by Pooler Broadcasters (PB), requesting the allotment of Channel 263A to Pooler, Georgia, as the community's first local FM service.[2]

2. We believe the public interest would be served by substituting Channel 266C2 for Channel 266A at Hardeeville since it could provide the community and its environs with expanded FM service. Channel 266C2 can be allotted to Hardeeville in compliance with the Commission's minimum distance separation requirements with a site restriction of 30.2 kilometers (18.8 miles) southwest to avoid a short-spacing to Station WALD-FM, Channel 265A, Walterboro, South Carolina.[3] As proposed, we shall also modify petitioner's construction permit for Station WWDR to specify operation on Channel 266C2.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **August 12, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Hardeeville, South Carolina	266C2

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the permit of Benjamin M. Tucker, *et al.*, d/b/a Jessup Broadcasting Limited Partnership for Station WWDR, Hardeeville, South Carolina, IS MODIFIED effective **August 12, 1988,** to specify operation on Channel 266C2, in lieu of Channel 266A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That the counterproposal filed by Pooler Broadcasters requesting the allotment of Channel 263A to Pooler, Georgia (RM-6193), IS DISMISSED.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The community of Pooler, Georgia, has been added to the caption.

[2] Public Notice of the filing of the counterproposal was given on December 28, 1987, Report No. 1702. However, on April 8, 1988, PB withdrew its interest in the allotment and requested dismissal of its counterproposal. No other party filed comments expressing an interest in use of the channel at Pooler. Therefore, that portion of petitioner's comments which concerns the allotment of Channel 263A at Pooler need not be discussed and we shall dismiss the request.

[3] The coordinates for this allotment are North Latitude 32-03-16 and West Longitude 81-14-25.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-521

In the Matter of

Amendment of Section 73.202(b), RM-6006
Table of Allotments,
FM Broadcast Stations.
(Ocean Springs, Mississippi)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: June 10, 1988; Released: June 27, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission considers herein the *Notice of Proposed Rule Making*, 2 FCC Rcd. 7109 (1987), issued in the above-captioned proceeding in response to a petition filed by Wes Yeager (petitioner) proposing the allotment of FM Channel 223A to Ocean Springs, Mississippi, as that community's second local service. Supporting comments were filed by petitioner reaffirming his intention to apply for the channel, if allotted. A counterproposal, which has been accepted as comments in this proceeding, was filed by Charles H. Cooper, licensee of Station WOSM(FM), Oceans Springs, requesting a 4.4 kilometer (2.7 miles) site restriction be imposed on Channel 223A in order to accommodate the proposed substitution of Channel 276C2 for Channel 276A at Ocean Springs.[1]

2. We believe the public interest would be served by allotting Channel 223A to Ocean Springs since it could provide an additional local FM broadcasting service to the community for the expression of diverse view points and programming.

3. The *Notice* indicated that Channel 223A could be allocated to Ocean Springs in compliance with the Commission's spacing requirements at the city reference coordinates. The proposed channel is fifty-three channels removed from Station WOSM's Channel 276A, and therefore gives rise to an intermediate frequency (IF) spacing relationship between the two allotments. The petitioner's proposal does not violate the protection requirements of Section 73.207(b) with respect to the existing and authorized facilities of Station WOSM(FM) but does prevent any upgrade in facilities at the existing site. Therefore, in response to the counterproposal, we shall impose a site restriction 4.4 kilometers west on Channel 223A at Ocean Springs.[2] The site restriction will provide an existing station the opportunity to upgrade its facilities from Class A to Class C2 while still permitting a new Class A facility to be established to serve Ocean Springs.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **August 12, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Ocean Springs, Mississippi	223A, 276A

5. The window period for filing applications on Channel 223A at Ocean Springs, Mississippi, will open on **August 15, 1988,** and closes on **September 14, 1988.**

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. Questions related to the window application filing process should be address to the Audio Services Division, FM Branch, Mass Media Bureau, (202) 632-0394.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The counterproposal has been accepted as a new petition (RM-6316).

[2] The coordinates for Channel 223A at Ocean Springs are 30-24-34 and 88-52-22.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-278

In the Matter of

Amendment of Section 73.202(b), RM-5714
Table of Allotments,
FM Broadcast Stations.
(Agana, Guam)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: May 17, 1988; Released: June 28, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission herein considers the *Notice of Proposed Rule Making*, 2 FCC Rcd. 5246 (1987), which proposed to allot Channel 270C2 to Agana, Guam, as its fifth FM service. The *Notice* was issued in response to a petition filed by Serafin M. Dela Cruz (petitioner). Supporting comments were filed by Joseph F. Ada, Governor of the Territory of Guam and by the petitioner, restating his interest in the channel.

2. We believe that the public interest would be served by adopting the requested proposal. As indicated in the *Notice*, Channel 270C2 can be allotted to Agana, Guam, consistent with the separation requirements of Section 73.207 of the Commission's Rules.[1]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **August 12, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the following community:

City	Channel No.
Agana, Guam	230C2, 238C2, 248C2, 268C2, 270C2

4. The window period for filing applications will open on **August 15, 1988,** and close on **August 30, 1988.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Montrose H. Tyree, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] Coordinates for Channel 270C2 at Agana, Guam are South Latitude 13-28-56 and East Longitude 144-49-47.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-13

In the Matter of

Amendment of Section 73.202(b), RM-6110
Table of Allotments,
FM Broadcast Stations.
(Paynesville, Minnesota)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: May 17, 1988; Released: June 27, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it the *Notice of Proposed Rule Making*, 3 FCC Rcd. 528 (1987), proposing the allocation of FM Channel 255C2 to Paynesville, Minnesota, as that community's first FM broadcast service. The *Notice* was issued in response to a petition filed by Paynesville Broadcasting Company (petitioner). Comments were filed by the petitioner restating its interest in the allocation. No other comments were received.

2. Channel 255C2 can be allocated to Paynesville, Minnesota, consistent with the minimum distance separation requirements of Section 73.207 of the Commission's Rules.[1]

3. In view of the fact that Channel 255C2 can be allocated to Paynesville to provide the community with its first FM broadcast service, we find the allotment to be in the public interest. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **August 12, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Paynesville, Minnesota	255C2

4. The window period for filing applications will open on **August 15, 1988,** and close on **August 30, 1988.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] Coordinates for the proposal are 45-22-48 and 94-42-48.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-458

In the Matter of

Amendment of Section 73.202(b), RM-5901
Table of Allotments,
FM Broadcast Stations.
(West Plains, Missouri)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: May 17, 1988; Released: June 27, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission herein considers the *Notice of Proposed Rule Making*, 2 FCC Rcd. 6528 (1987), issued in response to a petition filed by C M Broadcasting Company (petitioner), requesting the substitution of FM Channel 273C2 for Channel 272A at West Plains, Missouri. Petitioner also requested modification of its license for Staiton KKDY-FM, to specify operation on the higher class channel. Petitioner filed supporting comments in which it reaffirmed its interest in the channel. No other comments were received.

2. We believe the public interest would be served by the substitution of FM Channel 273C2 for Channel 272A at West Plains, Missouri, since it could provide the community with its second wide coverage area FM service. The substitution can be made in compliance with the minimum distance separation requirements provided there is a site restriction 5.5 kilometers (3.4 miles) southwest of the community.[1] The site restriction will prevent a conflict with Station KEZK(FM), Channel 273C, St. Louis, Missouri.

3. We have authorized a modification of petitioner's license for Station KKDY-FM, West Plains, Missouri, to specify operation on Channel 273C2 in accordance with Section 1.420(g) of the Commission's Rules.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **August 12, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below:

City	Channel No.
West Plains, Missouri	230C1, 273C2

5. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of Station KKDY-FM, West Plains, Missouri, IS MODIFIED to specify operation on Channel 273C2 subject to the following conditions:

(a) Within 90 days of the effective date of this Order, the licensee shall file with the Commission a minor change application for construction permit (Form 301) specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Depty Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates used for Channel 273C2 at West Plains, Missouri, are 36-43-03 and 91-54-38.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-282

In the Matter of

Amendment of Section 73.202(b), RM-6300
Table of Allotments,
FM Broadcast Stations.
(Greenwood, Mississippi)

NOTICE OF PROPOSED RULE MAKING

Adopted: May 17, 1988 **Released: June 27, 1988**

By the Deputy Chief, Policy and Rules Division:

1. A petition for rule making has been filed by Itawamba County Broadcasting Company, Inc. (petitioner), requesting the substitution of FM Channel 230A for Channel 270A at Greenwood, Mississippi. Petitioner is the licensee of FM Station WFTA, Channel 270C2, Fulton, Mississippi. Station WFTA was permitted to upgrade its facility from Channel 269A to Channel 270C2 in MM Docket 86-233, and has a construction permit on file for Channel 270C2 (BMPH 861209IA). According to petitioner, the substitution of channels at Greenwood would permit it to move its transmitter and antenna to a better location in a southwest direction from its present site. Petitioner states that at the present time it operates using power supplied by a rural electric power association, and that it experiences power outages up to two hours in length on a consistent basis. Petitioner provides that its transmitter is located at the end of one power system and at the beginning of another one. If the channel substitution is made at Greenwood, according to petitioner, it would be able to move to a location which would put it on a much improved power system and help eliminate transformer burnouts, tube failure and off air time.

2. We shall invite comments on Station WFTA's request proposing the substitution of Channel 230A for Channel 270A at Greenwood, Mississippi. Channel 270A was allocated to Greenwood in MM Docket 84-231 and was made available for application in window number 32, which closed on September 22, 1987, and for which two applications are now pending. The proposed substitution at Greenwood can be accomplished in compliance with the minimum distance separation requirements of the Commission's Rules at both applicant's specified sites.[1] In accordance with Commission policy, we would retain the applicant's cut-off protection for Channel 270A when the applicant amends to specify Channel 230A, since the channels are equivalent. *See Phillipsburg, Kansas* (Docket 82-145), 48 Fed. Reg. 10844, published March 15, 1983.

3. In view of the foregoing, the Commission proposes to amend the FM Table of Allotments, Section 73.202 of the Commission's Rules, as follows:

	Channel No.	
City	Present	Proposed
Greenwood, Mississippi	270A, 282A, 256C	230A, 282A, 256C

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **August 19, 1988,** and reply comments on or before **September 6, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Itawamba County Broadcasting Company, Inc.
Olvie E. Sisk, President
P.O. Box 587
Fulton, Mississippi 38843

6. IT IS FURTHER ORDERED, That the Secretary for the Commission shall send by CERTIFIED MAIL, RETURN RECEIPT REQUESTED, a copy of this Order to the following:

Clay Ewing
1110 Wright Street
Greenwood, Mississippi 38939
(Applicant for Channel 270A)

MA&E Broadcasting Inc.
1015 Russell Avenue
Greenwood, Mississippi 38930
(Applicant for Channel 270A)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief, Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Clay Ewing (870918MI) are 33-31-55 and 90-11-38. The coordinates for MA & E Broadcasting, Inc. (870922MK) are 33-30-41 and 90-09-31.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

NATIONAL GATEWAY TELECOM, INC.

File No. CSG-88-039-P/L

Application for authority to construct and operate international earth station facilities at Andrews AFB, Maryland, for provision of INTELSAT Business Services

ORDER AND AUTHORIZATION

Adopted: June 15, 1988; Released: June 27, 1988

By the Chief, International Facilities Division:

1. The Commission is considering an application, filed on April 25, 1988, by National Gateway Telecom, Inc. (NGT), requesting authority, pursuant to Title III of the Communications Act of 1934 and Section 201(c)(4), (c)(6) and (c)(7) of the Communications Satellite Act of 1962, to construct and operate international earth station facilities at Andrews AFB, Maryland, for provision of INTELSAT Business Services (IBS). The application was placed on public notice on May 5, 1988. No comments were received. The applicant has been granted blanket authority to establish and operate channels of communication between the U.S. and various overseas points for provision of IBS service.[1]

2. The proposed earth station will consist of a 13 meter antenna which complies with INTELSAT Standard B technical parameters and communicates with INTELSAT Atlantic Ocean Region satellites in the 6/4 GHz band. The facilities will be located at Andrews AFB in Maryland and will be used to provide a full range of IBS services to international points.

3. In its Report and Order in the Earth Station Ownership Proceeding in CC Docket No. 82-540, the Commission modified its policy on the ownership and operation of U.S. international earth stations that access the INTELSAT system by permitting carriers, individually or jointly, to own and operate their own earth station facilities.[2] In that Order, the Commission distinguished between IBS and/or television earth stations and multipurpose stations. It determined that earth stations dedicated to providing IBS and/or television services do not raise the same concerns about impact on the INTELSAT system that are raised by multipurpose stations. It also determined that the public interest requires that IBS be introduced in the United States as soon as possible. The Commission therefore concluded that it would consider only minimal legal, financial, and technical qualifications of the applicant as required by Section 308 and 319 of the Communications Act, when processing IBS and television service applications. The Commission further concluded that absent special problems, it would treat these applications as routine and expeditiously process them. [3] The Commission has granted many applications to construct and operate IBS earth stations based on this approach.[4]

4. The applicant's legal, technical, and financial qualifications to construct and operate the proposed earth station are established. The applicant has been authorized to construct and operate other IBS earth stations.[5] The proposed earth station complies with INTELSAT Standard B technical parameters for IBS earth stations. The applicant has completed the necessary frequency coordination for the transmitting frequency bands: 5925.0 - 6018.2 MHz, 6050.2 - 6136.8 MHz and 6168.8 - 6425.0 MHz.

5. The scope of operation of the proposed station will be the same as that permitted by the Commission in previous IBS authorizations. We will limit the authorization to the provision of IBS and those video services compatible with the station's digital format operation. To the extent that the applicant may seek to provide certain newly proposed INTELSAT services which fall within the IBS/television service category, we will not restrict operation of the proposed station. However, it may not provide any service which falls outside the IBS/television service category. Any authorization to use the proposed station as a multipurpose earth station would require a determination as to traffic and revenue diversion from existing multipurpose earth stations that may result.

6. Upon consideration of the application, we find that authorization of requested services and facilities is in the public interest.

7. Accordingly, IT IS ORDERED, pursuant to Sections 304, 309 and 319 of the Communications Act of 1934 and Section 201(c) of the Communications Satellite Act of 1962, that application File No. CSG-88-039-P/L IS GRANTED, and NGT is authorized to construct and operate the proposed earth station at Andrews AFB, Maryland, with the limited transmitting frequencies listed in paragraph 4 to provide IBS and related digital video services.[6] Before completion of equipment installation and facility activation, however, the applicant shall provide the Commission with a summary of equipment which was actually installed.

8. This order is issued under Section 0.291 of the Commission's Rules and Regulations and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of the date of public notice of this order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *See* Satellite Gateway Communications, Inc., File No. I-T-C-86-045, released March 4, 1986.

[2] Earth Station Ownership, 100 FCC 2d 250 (1984).

[3] Upon grant of an IBS/television service application, the applicant will be issued a combined Radio Station Construction Permit and License (FCC Form 456-P). While the Commission will limit the use of the authorized facilities to the provision of IBS or television services, carriers may seek additional authorization if they desire to use these facilities as multipurpose earth stations.

[4] *See* cases cited in Satellite Gateway Communications, Inc., Mimeo No. 2696 (released March 4, 1986) and American Telephone and Telegraph Co., Mimeo No. 3327 (released March 25, 1986).

[5] *See* Satellite Gateway International, Inc., File No. CSG-86-010-P/L, released March 4, 1986.

[6] This authorization is not to be construed as permitting the provision of IBS between earth stations located within the United States.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

UNITED STATES TRANSMISSION SYSTEMS, INC.

File No. I-T-C-88-105

Application for authority to acquire and operate facilities for service to Canada

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: June 14, 1988 **Released: June 27, 1988**

By the Chief, International Division:

1. The captioned uncontested application, filed on April 5, 1988, by United States Transmission Systems, Inc. (USTS), requests authority, pursuant to Section 214 of the Communications Act of 1934, as amended, to lease and operate facilities for direct service to Canada. The application was placed on public notice on April 20, 1988. No comments were received. Upon consideration of the application, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service to Canada by USTS.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-88-105 IS GRANTED, and USTS is authorized to:

a. lease from Western Union Telegraph Company (WU) and operate 10 DS-1 channels (240 circuit capacity) between the WU terminal in Detroit, Michigan and the point of interconnection with CNCP, USTS' correspondent in Canada, at Detroit;

b. lease from Michigan Bell and operate 10 DS-1 channels between the USTS and WU terminals in Detroit;

c. lease from WU and operate 96 analog circuits between the USTS and WU terminals in Washington, D.C.;

d. lease from WU and operate 96 analog circuits between the WU terminals in Washington, D.C. and New Oregon, New York and the point of interconnection with CNCP at Buffalo, New York; and

e. use said facilities, in conjunction with existing USTS facilities, to provide USTS' regularly authorized services between the U.S. and Canada and beyond.

3. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between USTS and its correspondent in Canada, and a copy of the agreement shall be filed with the Commission within 30 days of its execution.

4. This authorization is effective on its release date and shall be continued year-to-year, unless the Commission notifies the applicant to the contrary and requires a new application to be filed. If the Commission requires a new application to be filed, the authorization will continue in effect until Commission action on the application.

5. This order is issued under Section 0.291 of the Commission's rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MIDCO COMMUNICATIONS, INC. — File No. I-T-C-88-106

Application for authority to operate as an international resale carrier

TRI-STATE TELECOMMUNICATIONS CORPORATION OF TENNESSEE — File No. I-T-C-88-109

Application for authority to operate as an international resale carrier

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: June 14, 1988 **Released: June 27, 1988**

By the Chief, International Facilities Division:

1. Midco Communications, Inc. (Midco) and Tri-State Communications Corporation of Tennessee (Tri-State) have filed applications on April 4, and 14, 1988, respectively, requesting authority, pursuant to Section 214 of the Communications Act of 1934, as amended, to resell the switched message telephone services of existing carriers to provide international switched voice service between the U.S. and various overseas points. The applications were placed on public notice on April 20, 1988. No comments were received.

2. The applicants are already providing domestic resale services. They now propose to resell international switched voice services in competition with other carriers already providing resale of such service. In recent authorizations of new entrants, the Commission has recognized that increased competition in international markets is beneficial.[1] We find that the market will support additional carriers and that the added competition will be in the public interest.[2]

3. For the foregoing reasons, IT IS CERTIFIED that the present and future convenience and necessity require the provision of international switched voice services in the general public by Midco and Tri-State.

4. Accordingly, IT IS ORDERED that applications File Nos. I-T-C-88-106 and I-T-C-88-109 ARE GRANTED; and

a. Midco is authorized to provide international switched voice services by the resale of the international switched voice services set forth in AT&T's Tariffs FCC Nos. 1 and 2, MCI's Tariff FCC No. 1 and US Sprint's Tariffs FCC Nos. 1 and 2, between the United States and those points listed in those tariffs; and

b. Tri-State is authorized to provide international switched voice services by the resale of the international switched voice services set forth in AT&T's Tariff FCC No. 1, MCI's Tariff FCC No. 1 and US Sprint's Tariff FCC No. 1, between the United States and those points listed in those tariffs.

5. Copies of any operating agreements entered into between the applicants and their correspondents shall be filed with the Commission within 30 days of their execution.

6. IT IS FURTHER ORDERED that the applicants shall file tariffs pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

7. This order is issued under Section 0.291 of the Commission's rules and is effective upon release. Petitions for reconsideration under section 1.106 or applications for review under Section 1.115 of the rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *See* the cases cited in Teltec Saving Communications Co., Mimeo No. 3548, (released April 4, 1986) at n. 2.

[2] FCC v. RCA Communications, Inc., 346 U.S. 86 (1953); Mackay Radio and Telegraph Co., 28 FCC 231 (1960).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TRT TELECOMMUNICATIONS CORPORATION — File No. I-T-C-88-108

Application for authority to acquire and operate facilities for service to Nigeria and beyond

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: June 14, 1988 **Released: June 27, 1988**

By the Chief, International Facilities Division:

1. The captioned uncontested application, filed on April 13, 1988, by TRT Telecommunications Corporation (TRT), requests authority, pursuant to Section 214 of the Communications Act of 1934, as amended, to lease and operate facilities for direct service to Nigeria. The application was placed on public notice on April 20, 1988. No comments were received. Upon consideration of the application, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service to Nigeria by TRT.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-88-108 IS GRANTED, and TRT is authorized to:

a. lease from RCA Global Communications, Inc. (RCA) six telegraph-grade half-circuits between RCA's operating center at Piscataway, New Jersey and Nigeria;

b. lease and operate domestic connecting facilities between RCA's operating center in Piscataway, New Jersey and TRT's operating center in New York, New York; and

c. use said facilities to provide TRT's regularly authorized services between the U.S. and Nigeria and beyond.

3. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between TRT and its correspondent in Nigeria, and a copy of the agreement shall be filed with the Commission within 30 days of its execution.

4. This authorization is effective on its release date and shall be continued year-to-year, unless the Commission notifies the applicant to the contrary and requires a new application to be filed. If the Commission requires a new application to be filed, the authorization will continue in effect until Commission action on the application.

5. This order is issued under Section 0.291 of the Commission's rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-298

In re Applications of

LIGHTHOUSE FM LIMITED PARTNERSHIP (hereafter Lighthouse)	File No. BPH-870330MD
PETER WINSLOW (hereafter Winslow)	File No. BPH-870330MO
MICHAEL GLITSCH (hereafter Glitsch)	File No. BPH-870331NO
ECHONET CORPORATION (hereafter Echonet)	File No. BPH-870331OH
MID-CITIES CORP. (hereafter Mid-Cities)	File No. BPH-870415KP

For Construction Permit for a
New FM Station, Channel 241C2, 96.1 MHz
Odessa, Texas

HEARING DESIGNATION ORDER

Adopted: June 8, 1988; Released: June 28, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Winslow*. The applicant has indicated that he will colocate his antenna on an existing tower that is currently authorized for several users including KKH 464. Winslow states that the coordinates that are on file with the FCC and FAA for this tower are incorrect. According to Commission records, the accepted coordinates for this tower are North Latitude 31§ 47" *40* " and West Longitude 102§ 35' *15* ". Winslow claims that the correct tower coordinates are North Latitude 31§ 35' *28* " and West Longitude 102§ 35' *17* ". Item 3 of Section V-G of FCC Form 301 indicates that the FAA was not notified by Winslow of the corrected coordinates. Therefore, the Commission has not received a determination from the FAA with respect to these coordinates. Accordingly, an air hazard issue will be specified.

3. *Echonet*. The applicant indicates in Item 7 of Section V-B of FCC Form 301 that a directional antenna is *not* being proposed. However, in Figure 1 to its application, Echonet proposes a directional antenna pattern. This error has no effect on the acceptability of Echonet's application, which complies with all of our technical acceptance requirements. Furthermore, we are able to confidently and reliably determine that a directional antenna is being proposed. However, Echonet will be required to file an amendment with the presiding Administrative Law Judge within 30 days of the date of this Order which corrects its response to Item 7 of Section V-B, FCC Form 301.

4. The applicants below have petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	AMENDMENTS FILED
Winslow	July 8, 1987; March 4, 1988
Echonet	December 18, 1987; February 16, 1988; April 26, 1988

5. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

6. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

7. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower height and location proposed by Winslow would constitute a hazard to air navigation.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

8. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

9. IT IS FURTHER ORDERED, That Echonet file an amendment with the presiding Administrative Law Judge within 30 days of the date of this Order correcting its response to Item 7 of Section V-B of FCC Form 301.

10. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by the following applicants ARE GRANTED, and the corresponding amendments ARE

ACCEPTED to the extent indicated herein: Winslow (7/8/87 & 3/4/88) and Echonet (12/18/87, 2/16/88 & 4/26/88).

11. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

12. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, not later than **July 19, 1988,** file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

13. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-297

In re Applications of

FRANKLIN BROADCASTING COMPANY, INC. (hereafter Franklin)	File No. BPH-870702MB
BENJAMIN J. TERRY (hereafter Terry)	File No. BPH-870709MF
KB BROADCASTING, A LIMITED PARTNERSHIP (hereafter KB)	File No. BPH-870710MC
LOUISBURG FM RADIO, LTD. (hereafter Radio)	File No. BPH-870710ND

For a Construction Permit
for a New FM Station
on Channel 273A
in Louisburg, North Carolina

HEARING DESIGNATION ORDER

Adopted: June 7, 1988; Released: June 28, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

3. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed.[1] Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

4. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine, which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in the light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

5. IT IS FURTHER ORDERED, That Franklin County's November 19, 1987 letter of objection is dismissed as moot.

6. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

7. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, not later than **July 19, 1988,** file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

8. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTE

[1] The antenna structure specified by KB received a favorable FAA determination on December 9, 1987. The determination disposes of the objection of Franklin County. Accordingly, Franklin County's November 19, 1987 letter of objection will be dismissed as moot.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-244

In re Applications of

REBECCA RADIO OF MARCO A Limited Partnership	File No. BPH-850711OB
EMERALD SEA BROADCASTING	File No. BPH-850712OF
AFFIRMATIVE BROADCASTING CORPORATION	File No. BPH-850712TX
SHOWCASE COMMUNICATIONS, INC.	File No. BPH-850712UB
MARCO MINORITY ASSOCIATES	File No. BPH-850712UA
SUSAN G. & WILLIAM R. GASTON	File No. BPH-850712UE
MARCO SKYWAVE, INC.	File No. BPH-850712UH

For Constuction Permit for a
New FM Station on Channel 224A
(92.7 MHz)
Marco, Florida

MEMORANDUM OPINION AND ORDER

Adopted: June 17, 1988; Released: June 28, 1988

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

1. Now before us is a Joint Petition for Extraordinary Relief, as well as a Joint Request for Stay, filed by all remaining parties to the captioned proceeding on June 7, 1988. The Extraordinary Relief petition is,in essence, an appeal from presiding Administrative Law Judge Joseph Chachkin's (ALJ) *Memorandum Opinion and Order*, FCC 88M-1557, released May 24, 1988, denying the parties' Joint Request for Approval of Settlement Agreement filed with the ALJ on March 28, 1988.

2. Previously in this proceeding, we issued a *Memorandum Opinion and Order*, 3 FCC Rcd 2256 (Rev. Bd. 1988), adopted April 5, 1988, granting a temporary stay of this comparative hearing proceeding, which was then scheduled for April 18, 1988. Therein, we explained that "while a close question, on balance we believe that under the specific circumstances of this particular proceeding, the requested temporary stay should issue to permit the parties to attempt a settlement." *Order*, *Id.*, at 2257. We further observed that (*id.*):

> Under most circumstances we would deny the relief requested. The parties have not properly exhausted their administrative remedies before the ALJ and their request is premature. (*See* Section 1.301(b) of the Commission's Rules, 47 C.F.R. § 1.301(b)). However, the hearing would now, in many respects, be virtually meaningless because there remain only seven applicants, who have all effectively declared that they are, in reality, no longer interested in litigating to establish their right to serve the needs and interests of the public in Marco, Florida. Indeed, they have agreed to forego that right for the following sums: In the case of Rebecca Radio of Marco, the price is70,000. For Marco Minority Associates the consideration is70,000; Marco Skywave, Inc.,35,000; Showcase Communications, Inc.,200,000; Emerald Sea Broadcasting,250,000; William R. and Susan G. Gaston, 200,000; and, Affirmative Broadcasting Corporation,230,000.
>
> The proposed vehicle for effectuating this settlement is to have a non-party to this proceeding, Rowland Gulf Radio, Inc. (Rowland) provide the significant sums involved, substitute Rowland for Affirmative Broadcasting Corporation (utilizing Affirmative's engineering proposal at least for the time being; however, it is admitted that Rowland will "most iikely . . . file for a change of [antenna] site . . ."), and have the construction permit awarded to Rowland.

As noted *supra*, para. 1, the ALJ has now formally disapproved the proposed settlement agreement by *Order* released May 24, 1988, and established the recommencement of the hearing for July 18, 1988. Immediately thereafter, the parties, again without following clear and established Commission Rules (Section 1.301(b); 47 C.F.R. § 1.301(b)), filed their instant petitions with us.

3. We will deny the relief requested. Appellants were on specific notice from our prior *Order* that they must properly exhaust their administrative remedies before the ALJ. Nevertheless, despite our reminder, appellants have again ignored the rules. *See also*, *Jan - Di Broadcasting, Inc.*, 93 FCC 2d 890 (Rev. Bd. 1983); *Arcatel, Inc.*, 92 FCC 2d 893 (Rev. Bd. 1982). Further, appellants also appear to have disregarded our caveat that even if the proposed settlement were properly before us, "we would, at best, certify the matter to the Commission pursuant to Section 0.363(a) of the Commission's Rules. . . because we believe the settlement presents a novel issue of law and/or policy." *Id.* Notwithstanding, the parties did not request the ALJ to certify the matter to the Commission, but to approve a novel settlement the Board had described as heretofore unsanctioned by the Commission. Although, given the Board's clear language, the ALJ could have certified the matter, *sua sponte*, to the full Commission, it cannot be

claimed that the ALJ refused any such request from the parties to do so. Instead, the parties merely attempt a second end-run around the ALJ and the rules, requesting an action which the Board plainly signaled it would not take without more specific guidance from the Commission.

4. Having violated Section 1.301(b) of the rules a second time, we will not entertain the parties' unauthorized appeal or request for stay. At the same time, the Board is aware that the basic permissibility of the settlement proposed is the subject of sharp disagreement between the Commission's ALJs, with Deputy Chief ALJ Tierney having approved a similar settlement in *Pollack Broadcasting Co.*, FCC 88M-987, released April 5, 1988, and ALJ Chachkin having disapproved the instant pact with strong language suggesting fundamental illegalities in the proposal. While the Board cannot ignore Section 1.301(b) and reach the merits of the appeal, we reprise the *obiter dictum* of our prior *Order* and exhort the ALJ to certify to the full Commission the question of whether such settlements are lawful or serve the public interest. Unless and until the Commission rules on this question, it is likely that the controversy will continue with attendant costs and delays.

5. ACCORDINGLY, IT IS ORDERED, That the Joint Petition for Extraordinary Relief and the Joint Request for Stay filed June 7, 1988 by Rebecca Radio of Marco; Emerald Sea Broadcasting; Affirmative Broadcasting Corporation; Showcase Communications, Inc.; Marco Minority Associates; Susan G. & William R. Gaston; and Marco Skywave, Inc., ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Eric T. Esbensen
Member, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

National Exchange Carrier
Association, Inc.

Petition for Waiver of
Sections 36.601(b),
36.611, 36.612 and 36.621
of the Commission's Rules

MEMORANDUM OPINION AND ORDER

Adopted: June 15, 1988 **Released: June 17, 1988**

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. The National Exchange Carrier Association, Inc. (NECA) has filed a petition on behalf of its member local exchange carriers (LECs) requesting a temporary waiver of certain provisions of the Commission's Rules regarding the Universal Service Fund (USF). Specifically, NECA seeks waiver of Sections 36.601(b), 36.611, 36.612 and 36.621[1] of the Commission's Rules for the period January 1, 1988, through June 30, 1988. During this period, NECA proposes to use former Sections 67.601(b), 67.611, 67.612 and 67.621. In addition, NECA requests a waiver to suspend the application of Section 36.612 from September 30, 1988, through March 30, 1989. Eight parties filed comments in support of NECA's request.[2] For the reasons discussed below, we grant NECA's petition.

II. BACKGROUND

2. NECA seeks a waiver of the Commission's Rules regarding the separations procedures for the USF. These rules generally require LECs with higher-than-average local loop costs to allocate additional expenses to the interstate jurisdiction. This is known as the USF expense adjustment which is calculated by NECA on the basis of data submitted to it by the LECs. The Separations Manual requires NECA to calculate for each study area an expense adjustment based on a formula that relates each study area's average unseparated loop cost per working loop to the national average unseparated loop cost per working loop. In accordance with Section 36.601(b), NECA computes the expense adjustment on the basis of data for the preceding calendar year which may be updated at the option of the LEC. Section 36.611 sets forth the information each LEC must provide to NECA on June 30 of each year. Section 36.612 provides that each LEC may update the information submitted to NECA and sets the dates on which the carriers may submit updated information. [3] Based on these quarterly updates, NECA recomputes a study area's expense adjustment based on a twelve-month rolling average. In accordance with Section 36.621, NECA determines the unseparated loop-related cost that is included in the calculation of the expense adjustment.

3. In accordance with the Commission's Rules, NECA must file a data submission with the Commission on September 1, 1988, which calculates the overall expense adjustment for each study area and which is based on 1987 costs booked by the LECs pursuant to the former Part 31 Uniform System of Accounts (USOA).[4] The former Part 67 identified the separations categories NECA was required to use in calculating the expense adjustment and which were based on the former Part 31 accounts. The new Separations Manual, however, became effective on January 1, 1988, and specifies separations categories which correspond to the new Part 32 accounts.

III. NECA'S PETITION AND PARTIES' COMMENTS

4. NECA requests that the LECs be allowed to use the former Part 67 procedures to prepare their June 30, 1988, data submission. This data will be used by NECA to prepare its September 1, 1988, USF filing with the Commission. NECA argues that since the expense adjustment is based on data from the previous calendar year, data submitted in 1988 will be based on 1987 costs booked according to the former Part 31 accounting rules. NECA asserts that the new Part 36 rules are designed to function in conjunction with the changes in accounts in the new Part 32 accounting rules and that the expenses and investments booked under the new Part 36 do not correspond to the expenses and investments booked under the former Part 31 accounts. NECA contends that to avoid the use of inconsistent accounting rules in determining the underlying costs used in calculating the USF expense adjustment, we should allow the LECs to use the former Part 67 separations rules for the June 30, 1988, data submission.

5. Eight parties filed comments in support of NECA's waiver request USTA contends that allowing the LECs to continue to use the former Part 67 separations rules for the June 30, 1988, USF data submission would prevent the use of inconsistent accounting rules and would avoid the requirement that the LECs maintain two sets of books. NTCA believes that any alternative plan would result in unforeseeable and unwarranted modifications of USF support. Ameritech notes that absent a waiver, NECA must modify the 1987 data to reflect the 1988 separations and accounting procedures which, Ameritech argues, would be virtually impossible because of difficulties in mapping expenses and investment from the former Parts 31 and 67 to Parts 32 and 36. Pacific also states that such mapping would be complex and costly. It also argues that because mapping would only result in estimated 1987 loop costs under Part 32, the resulting USF data would be less accurate than data based on the former Part 31 accounts. NYNEX states that the use of two distinct sets of accounting rules is burdensome and confusing. CHA asserts that we should grant NECA's petition because it would ensure that the 1988 USF filing and support levels are developed in a manner that is both accurate and administratively reasonable. GTOC states that it does not have an efficient and accurate method for restating the 1987 former Part 31 expenses and investments under the new Part 32 accounting rules.

6. NECA also seeks a temporary waiver to suspend the USF optional quarterly updates allowed by Section 36.612. NECA argues that because the former Parts 31 and 67

were superseded by Parts 32 and 36 effective January 1, 1988, and because the subsequent update filings would be based on both 1987 and 1988 data, the data used in calculating an individual LEC's loop cost for each study area would be generated under two sets of accounting rules for the September 30, 1988, December 30, 1988, and March 30, 1989, optional updated data submissions. NECA further argues that because the former Part 31 and the new Part 36 are incompatible, the LECs would be required to map investment and expenses recorded in the former Part 31 accounts into the new Part 32 accounts before they could apply Part 36 separations procedures. Therefore, NECA asserts, the calculations of a study area's average loop costs developed from two sets of accounting and separations rules would be measured against a nationwide average loop cost based on a single set of rules. NECA argues that absent a suspension of the quarterly updates, aberrations could exist in USF support levels simply due to the combination of two sets of accounting and separations rules. NECA maintains that temporary suspension of the quarterly updates will eliminate the potential for inconsistent accounting treatment.[5]

7. The commenting parties also support NECA's request for a temporary suspension of the optional USF quarterly updates provided for in Section 36.612. They agree with NECA's arguments that due to the changes in the Commission's Rules regarding separations and accounting procedures, effective January 1, 1988, the data for the updates would be generated under inconsistent rules.

IV. DISCUSSION

8. We grant both NECA's requested waivers. We believe that these waivers are necessary to avoid inconsistent separations and accounting rules and to avoid unreasonably burdensome administrative procedures. The LECs booked 1987 costs under the accounts in the former Part 31 and these costs were apportioned between the state and interstate jurisdictions according to the former Part 67 separations procedures. The separations procedures in the new Part 36, which replaced Part 67 effective January 1, 1988, are designed to function in accordance with accounts in Part 32, which replaced Part 31 on that date. Part 36 directs the LECs to submit data to NECA on June 30, 1988, based on amounts calculated as of December 31, 1987, and normally booked by the LECs under the former Part 31. Because of the changes in accounts under Part 32, the expenses and investment already booked under the former Part 31 will not correspond with the expenses and investment booked under Part 32. Therefore, for NECA to apply the Commission's Rules, the LECs would be required to provide to NECA 1987 costs booked under Part 32. Thus, the LECs would be required to map the 1987 costs already booked under the former Part 31 to the new Part 32, which would be unreasonably costly and burdensome. We therefore grant NECA's waiver to allow it to use the former Part 67 procedures for the period January 1, 1988, through June 30, 1988. This would eliminate the need for the LECs to modify the 1987 data to reflect the new Part 32 accounts and avoid the possibility of adjustments by the LECs to the actual data based on assumptions and speculations. We believe the granting of a temporary waiver of Sections 36.601(b), 36.611, 36.612, and 36.621 of the Commission's Rules from January 1, 1988, through June 30, 1988, will allow the LECs to employ corresponding and consistent separations and accounting rules to develop the data for the June 30, 1988, filing with NECA.[6]

9. We also grant NECA's request that we allow the temporary suspension of Section 36.612 from September 30, 1988, through March 30, 1989. The rules provide a process by which LECs may file optional updates of their annual data submission. This process requires that the quarterly updates filed between September 30, 1988, and March 30, 1989, be based on data for part of 1987 and part of 1988. Thus, these updates will be based on data using two sets of accounting and separations procedures, Parts 31 and 67 for the 1987 data and Parts 32 and 36 for the 1988 data. The nationwide average loop cost calculated by NECA, however, will be based on one set of accounting and separations procedures. To provide NECA with consistent data, the LECs would be required to map from one set of accounting procedures to the other. We believe such a requirement would impose an unwarranted and costly burden on ratepayers. Moreover, we believe such a requirement would impose a burden on NECA and would render the USF update process complex and unworkable. Granting this temporary suspension of the updates will also avoid comparison of the LECs' loop costs developed from two different sets of accounting and separations rules with the nationwide average loop costs based on a single set of accounting and separations rules. We therefore believe that a temporary suspension of the updates from September 30, 1988, to March 30, 1989, will remedy this transitional problem.

V. ORDERING CLAUSES

10. Accordingly, IT IS ORDERED, That the petition for temporary waiver of Sections 36.601(b), 36.611, 36.612 and 36.621 of the Commission's Rules for the period January 1, 1988, through June 30, 1988, filed by the National Exchange Carrier Association, Inc., IS GRANTED.

11. IT IS ALSO ORDERED, That the petition for a waiver to allow a temporary suspension of Section 36.612 for the period September 30, 1988, through March 30, 1989, filed by the National Exchange Carrier Association, Inc., IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] 47 C.F.R. §§36.601(b), 36.611, 36.612 and 36.621. The Part 36 Separations Manual replaced the former Part 67 Separations Manual effective January 1, 1988. Amendment of Part 67 (New Part 36) of the Commission's Rules and Establishment of a Joint Board, CC Docket Nos. 78-72, 80-286 and 86-297, 2 FCC Rcd 2639 (1987), *petitions for recon.* filed June 8, 1987.

[2] A pleading cycle for comments was established in Public Notice, Pleading Cycle Established on National Exchange Carrier Association, Inc., Petition for Waiver of Rules Regarding Universal Service Fund, 3 FCC Rcd 498 (1988). Comments were filed by

the Ameritech Operating Companies (Ameritech), BellSouth Corporation and its Operating Telephone Companies, Southern Bell Telephone and Telegraph Company and South Central Bell Telephone Company (BellSouth), Cathey, Hutton and Associates, Inc. (CHA), GTE Service Corporation and its affiliated domestic telephone operating companies (GTOC), New York Telephone Company and New England Telephone and Telegraph Company (NYNEX), the National Telephone Cooperative Association (NTCA), Pacific Bell and Nevada Bell (Pacific) and the United States Telephone Association (USTA). No party filed reply comments.

[3] Following their data submission on June 30 of each year, the LECs are permitted to update that data on the following September 30, December 30, and March 30.

[4] The former Part 31 USOA of the Commission's Rules was superseded by the Part 32 USOA effective January 1, 1988. Revision of the Uniform System of Accounts and Financial Reporting Requirements for Class A and Class B Telephone Companies (Part 31, 33, 42, and 43 of the FCC's Rules), CC Docket No. 78-196, FCC 86-221, released May 15, 1986, 51 Fed. Reg. 43,498 (December 2, 1986).

[5] NECA adds that the temporary suspension it requests would not eliminate the ability of the LECs to correct errors in previous data submissions.

[6] Our decision to allow NECA to use the former USOA and Separations Manual in computing the level of USF for 1988 is based on the unique administrative problems involved and should not be construed as precedent for other issues, such as the application of superseded tax laws and rate of return.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

FURTHER COMMENT REQUESTED ON NTIA'S PETITION FOR DECLARATORY RULING ON BOC PROVISION OF INFORMATION SERVICES

Released: June 21, 1988

On November 24, 1987, NTIA filed a petition requesting that the Commission issue a declaratory ruling finding that, under the Communications Act of 1934, the public interest requires that the Bell Operating Companies (BOCs) be allowed to provide information services, and that the MFJ Court's restriction on BOC provision of information services is an unnecessary layer of regulation that is in irreconcilable conflict with the Act. Parties filed comments on the NTIA petition on January 14, 1988, and reply comments on February 3, 1988.

On March 7, 1988, the MFJ Court issued a decision that reaffirmed its general restriction on BOC information services, but permitted the BOCs to provide certain information and information transmission services. In general, the BOCs will be able to provide "information transmission services," including gateway services, and voice storage and retrieval services, but not services for which they generate or manipulate information content. Following the March 7 Decision, several of the BOCs have announced their intention to provide certain information services.

In light of the events that have intervened since the close of the original pleading cycle, the Commission has decided that it would be useful to permit parties to supplement the record with additional comments. Accordingly, interested persons may file additional comments on the NTIA petition by July 22, 1988 and reply comments by August 9, 1988. Copies of the pleadings relating to the NTIA petition may be obtained from International Transcription Services Inc. (ITS), Suite 140, 2100 M Street, N.W., Washington, D.C. 20037, or by contacting Grace Williams, Room 544, FCC, 1919 M Street, N.W., Washington, D.C. 20554. Interested parties should file comments with the Secretary, FCC, 1919 M Street, N.W. 20554. A copy should also be sent to the Commission's contractor for public service records duplication, ITS, and to Ruth Milkman, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington D.C. 20554.

For further information contact Ruth Milkman, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 632-6363.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-299

In re Applications of

EASTERN CAROLINA ELECTRONICS LIMITED PARTNERSHIP (hereafter Electronics)	File No. BPH-870429MG
NORTH STAR BROADCASTING CORPORATION (hereafter Star)	File No. BPH-870429MH
HOLY HANDS FM LIMITED PARTNERSHIP (hereafter Holy)	File No. BPH-870430MF
ROCKY MOUNT BROADCASTING LIMITED PARTNERSHIP (hereafter Rocky)	File No. BPH-870430MH
WRMT, INCORPORATED (hereafter WRMT)	File No. BPH-870430MK
FM ROCKY MOUNT LIMITED PARTNERSHIP (hereafter FRM)	File No. BPH-870430OL

For a Construction Permit
for a New FM Station on
Channel 253-A in
Rocky Mount, North Carolina

HEARING DESIGNATION ORDER

Adopted: June 9, 1988 **Released: June 28, 1988**

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM Station.

2. *Electronics*. Electronics proposes to co-locate on an existing AM tower, but fails to indicate whether or not the site is presently fenced or, if so, at what distance. Engineering study indicates that this proposal may significantly exceed the ANSI c95.1-1982 exposure guidelines for human exposure to radio frequency (RF) radiation as outlined in OST Bulletin No. 65 (October 1985). Consequently, we are concerned that Electronics may have failed to comply with the newly revised environmental criteria set forth in the *Report and Order* in GEN Docket No. 79-163, 51 Fed. Reg. 14,999 (April 12, 1986). Under the newly revised rules, applicants must determine whether their proposals would have a significant environmental effect under the criteria set out in the newly added 47 C.F.R. § 1.1307. If the application is determined to be subject to environmental processing under the 47 C.F.R. § 1.1307 criteria, the applicant must then submit an Environmental Assessment (EA) containing the information delineated in the newly revised 47 C.F.R. § 1.1311. 47 C.F.R. § 1.1307(b) states that an EA must be prepared if the proposed operation would cause exposure of workers or the general public to levels of RF radiation exceeding specific standards. Since Electronics' proposal may have a significant environmental impact as defined by 47 C.F.R. § 1.1307, it will be required to submit the environmental impact information described in 47 C.F.R. § 1.1311. Accordingly, Electronics will be required to file, within thirty days of the release of this Order, an EA with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting Corp.*, 71 FCC 2d 229 (1979), *recon. denied sub nom. Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980).

3. The material submitted by FRM fails to indicate that it will have less than five full-time station employees. The Commission requires that if there will be five or more full-time station employees, the applicant must complete and file Section VI of Form 301 and supply a statement detailing hiring and promotion policies even though there may be only a few members of minority groups residing within the proposed service area. Accordingly, FRM must either indicate that it will have less than five full-time employees or it must file Section VI information within 30 days of the release of this Order with the presiding Administrative Law Judge, or an appropriate issue will be specified by the Judge.

4. The applicants below have petitioned for leave to amend their applications. The accompanying amendments were filed after the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANT	AMENDMENT
WRMT	Aug. 26, 1987; Nov. 30, 1987 (eng.)
FRM	Nov. 2, 1987; Apr. 18, 1988

5. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together

with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

6. Attempts to obtain Federal Aviation Administration (FAA) clearance through the Commission's Antenna Survey Branch and the following applicants have been unsuccessful. Accordingly, since no determination has been received as to whether the antennas proposed by the applicants below would constitute a hazard to air navigation, as issue with respect thereto will be included and the FAA made a party to the proceeding. APPLICANTS: Electronics, Holy

7. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

8. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. If a final enviromental impact statement is issued with respect to Electronics in which it is concluded that the proposed facility is likely to have an adverse effect on the quality of the environment, to determine whether the proposal is consistent with the National Enviromental Policy Act, as implemented by 47 C.F.R. §§ 1.1301-1319.

2. To determine whether there is a reasonable possibility that the tower height and location proposed by the following applicants would constitute a hazard to air navigation: Electronics, Holy

3. To determine, which of the proposals would, on a comparative basis, best serve the public interest.

4. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

9. IT IS FURTHER ORDERED, That in accordance with paragraph 2 herein above, Electronics shall submit the environmental assessment required by 47 C.F.R. §1.1311 to the presiding Administrative Law Judge within 30 days of the release of this Order, with a copy to the Chief, Audio Services Division.

10. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, the following applicant shall either indicate that it will have less than five full-time employees or it shall submit Section VI information in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge: FRM

11. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by the following applicants ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein: WMRT, FRM

12. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

13. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

14. IT IS FURTHER ORDERED, That to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, not later than **July 19, 1988,** file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this order.

15. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in a manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-529

In the Matter of

Amendment of Section 73.202(b), RM-6001
Table of Allotments,
FM Broadcast Stations.
Traverse City, Michigan)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: May 20, 1988; Released: June 28, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission herein considers the *Notice of Proposed Rule Making*, 2 FCC Rcd. 7151 (1987), in response to a petition filed by Fabiano- Strickler Communications, Inc. (petitioner), requesting the substitution of FM Channel 298A for Channel 221A at Traverse City, Michigan. Petition also requests the modification of its license for Station WCCW-FM to specify operation on the new channel. Petitioner filed comments reaffirming its interest in Channel 298A at Traverse City. No other comments were received.

2. We believe the public interest would be served by the substitution of Channel 298A for Channel 221A at Traverse City, Michigan, as it would permit Station WCCW-FM to provide better service to the community. The substitution would also eliminate a short spacing to the Canadian allotment of Channel 221C at Sault Saint Marie, Ontario, that currently exists with Channel 221A. The substitution can be made in compliance with the minimum distance separation requirements of the Commission's Rules at the current site of Station WCCW-FM.[1] Canadian concurrence has been obtained since Traverse City is located within 320 kilometers (200 miles) of the U.S.-Canadian border.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **August 12, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Traverse City, Michigan	270C2, 278C, 298A

4. IT IS FURTHER ORDERED, That pursuant to the authority contained in Section 316(a) of the Communications Act of 1934, as amended, that the license of Station WCCW-FM, Traverse City, Michigan, IS MODIFIED to specify operation on Channel 298A subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in License BLH 3470 except the channel as specified above. Any changes, except those specified require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with License BLH 3470, except for the channel as specified above, and a license application (Form 302) is filed within 10 days of commencement of program tests.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 298A are 44-46-11 and 85-41-22.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-286

In the Matter of

Amendment of Section 73.202(b), RM-6378
Table of Allotments,
FM Broadcast Stations.
(Henderson, Tennessee)

NOTICE OF PROPOSED RULE MAKING

Adopted: May 25, 1988 **Released: June 28, 1988**

By the Deputy Chief, Policy and Rules Division:

1. At the request of Chester County Broadcasting Co., Inc. (petitioner), the Commission has before it for consideration a petition for rule making seeking the allotment of Channel 299A to Henderson, Tennessee, as that community's first local FM service. Petitioner states that it will apply for the channel, if allotted. The channel can be allotted to Henderson in compliance with the Commission's minimum distance separation requirements.[1]

2. In view of the fact that Henderson, Tennessee could receive its first local FM channel the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Henderson, Tennessee	—	299A

3. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

4. Interested parties may file comments on or before **August 19, 1988,** and reply comments on or before **September 6, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Chester County Broadcasting Co., Inc.
P. O. Box 203
Henderson, Tennessee 38340
(Petitioner)

5. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

6. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates are 35-26-24 and 88-38-24.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-285

In the Matter of

Amendment of Section 73.202(b), RM-6373
Table of Allotments,
FM Broadcast Stations.
(West Monroe, Louisiana)

NOTICE OF PROPOSED RULE MAKING

Adopted: May 25, 1988 **Released: June 28, 1988**

By the Deputy Chief, Policy and Rules Division:

1. Bill Dunnavant (petitioner) has before the Commission petition for rule making requesting the allotment of Channel 247A to West Monroe, Louisiana, as that community's second local FM service. Petitioner states that he will apply for the new channel, if allotted.

2. The Commission believes the proposal warrants consideration. Channel 247A can be allotted to West Monroe in compliance with the Commission's minimum distance separation requirements.[1]

3. In view of the fact that West Monroe, Louisiana could receive its second local FM channel the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
West Monroe, Louisiana	252A	247A, 252A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **August 19, 1988,** and reply comments on or before **September 6, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Bill Dunnavant
P. O. Box 389
Athens, Alabama 35611
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates are 32-31-06 and 92-08-51.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-283

In the Matter of

Amendment of Section 73.202(b), RM-6280
Table of Allotments,
FM Broadcast Stations.
(Port Gibson, Mississippi)

NOTICE OF PROPOSED RULE MAKING

Adopted: May 17, 1988 **Released: June 28, 1988**

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it a petition for rule making filed by Evan Doss, Jr. (petitioner), requesting the allocation of FM Channel 263A to Port Gibson, Mississippi, as that community's first FM broadcast service. Petitioner submitted information in support of the proposal and stated his intention to file an application for the channel.

2. We believe the proposal warrants consideration. Channel 263A can be allocated to Port Gibson, Mississippi, in compliance with the minimum distance separation requirements of the Commission's Rules.[1]

3. In view of the fact that the proposed allocation could provide a first FM broadcast service to Port Gibson, the Commission believes it is appropriate to propose amending the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Port Gibson, Mississippi	—	263A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **August 19, 1988,** and reply comments on or before **September 6, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Evan Doss, Jr.
P.O. Box 653
Port Gibson, Mississippi 39150

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief, Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 263A are 31-57-30 and 90-59-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-284

In the Matter of

Amendment of Section 73.202(b), RM-6138
Table of Allotments,
FM Broadcast Stations.
(Angola and Lagrange, Indiana; and
Brooklyn, Michigan)

NOTICE OF PROPOSED RULE MAKING

Adopted: May 25, 1988 **Released: June 28, 1988**

By the Deputy Chief, Policy and Rules Division:

1. Lake Cities Broadcasting Corporation (petitioner), licensee of Station WLKI-FM, Channel 261A, Angola, Indiana, has filed a petition for rule making seeking the substitution of FM Channel 287B1 for Channel 261A and modification of its license accordingly. Petitioner advises that in order to accomplish its proposal in compliance with Section 73.207(b) of the Commission's Rules, additional changes are required at Lagrange, Indiana and Brooklyn, Michigan.

2. Petitioner seeks the substitution of Channel 262A for vacant Channel 288A at Lagrange, Indiana.[1] Petitioner also seeks the substitution of Channel 225A for Channel 287A at Brooklyn, Michigan, an allotment for which four applications are pending.[2]

3. We believe the proposal warrants consideration in view of the expressed desire for a wider coverage area FM station to serve the public interest at Angola. A staff engineering analysis reveals that the proposed allotment of Channel 287B1 can be made at Angola in conformity with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules, provided the transmitter is sited at least 12.5 kilometers (7.8 miles) southeast [3] of the community to avoid short-spacing to (1) Channel 286A, Roanoke, Indiana,[4] as well as one application filed therefor (880107MG);[5] (2) Station WASK-FM, Channel 287B, Lafayette, Indiana;[6] and (3) a timely-filed application (870302MY) by Station WCXT(FM), Channel 287C1, Hart, Michigan,[7] to reclassify its facilities to maintain Class C status. Additionally, the required spacing separations are met based upon the directive to Station WIFF-FM, Auburn, Indiana, to move from Channel 288A to Channel 272A pursuant to Docket 81-61. Thus, we will serve Station WIFF-FM with a copy of this *Notice* so that it may indicate its plans in this regard. Additionally, Channel 262A can be substituted for Channel 288A at Lagrange, Indiana, with a site restriction 4.2 kilometers (2.6 miles) east[8] to avoid short-spacing to Station WYEZ(FM), Channel 264B, Elkhart, Indiana.[9] Channel 225A can be substituted for Channel 287A at Brooklyn, Michigan with a site restriction 10.0 kilometers (6.2 miles) southwest[10] to avoid short-spacing to the construction permit issued to Station WLTI(FM), Channel 226B, Detroit, Michigan.[11] Since the proposal is short-spaced to the licensed site of Station WLTI(FM),[12] final action in this proceeding must be conditioned upon the licensing of Station WLTI-FM at its new transmitter site.

4. In consideration of the above, we propose to modify petitioner's license to specify operation on Channel 287B1, as requested. However, in conformity with Commission precedent, should another interest in the Angola proposal be expressed, the modification could not be made unless at least one additional equivalent channel is available to accommodate other expressions of interest. *See* Section 1.420(g) of the Commission's Rules.

5. We shall serve a copy of this *Notice* on each of the applicants for Channel 287A at Brooklyn, Michigan, in order to elicit their comments on the proposal. In the event the channel allotment at Angola, Indiana, should change prior to the issuance of a permit for channel 287A at Brooklyn, Michigan, the applicants will be permitted to amend their applications to specify the newly allotted channel without loss of cut-off since no upgrade in the class of channel will result. *See Salamanca, NY and Bradford, PA*, 50 FR 26208 (1985) and *Sanibel, FL*, 50 FR 32706 (1985). This provision shall also apply at Lagrange, Indiana, in the event applications are filed on Channel 288A prior to resolution of this proceeding.

6. In the event a permit is issued for Channel 287A at Brooklyn, Michigan, prior to finalization of this proceeding, Commission policy requires that the benefiting party reimburse the permittee for reasonable costs incurred in changing frequencies. Therefore, petitioner herein should indicate its willingness to abide by that requirement. Failure to do so could result in a denial of this proposal.

7. Accordingly, in order to provide Angola with its first wide area coverage FM service, we propose to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with regard to the communities listed below, as follows:

	Channel No.	
City	Present	Proposed
Angola, Indiana	261A	287B1
Lagrange, Indiana	288A	262A
Brooklyn, Michigan	287A	225A

8. IT IS ORDERED, That the Secretary of the Commission SHALL SEND a copy of this *Notice* by CERTIFIED MAIL, RETURN RECEIPT REQUESTED, to the applicants for Channel 287A at Brooklyn, Michigan, as follows:

Geological Technology, Inc.
261 East Chicago Street
Jonesville, MI 49250

Cascades Broadcasting, Inc.
1700 Glenshire Drive
Jackson, MI 49201

Brooklyn Radio Partners
c/o P.O. Box 11101
Lansing, MI 48901

Richard James Tolly
3 North Street
Hillsdale, MI 49242

9. Additionally, the Secretary of the Commission SHALL SEND a copy of this *Notice* to C. P. Broadcasters, Inc., Station WIFF-FM, 5446 CR 29, Auburn, IN 46706 to determine its relocation plans as indicated in paragraph 3, *supra*.

10. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

11. Interested parties may file comments on or before **August 19, 1988,** and reply comments on or before **September 6, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Richard J. Hayes, Jr., Esq.
1359 Black Meadow Road
Greenwood Plantation
Spotsylvania, VA 22553

12. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certificationthat Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

13. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] When this proposal was filed, a construction permit had been issued to Dawn Marie Price for Station WAEO(FM) on Channel 288A at Lagrange (BPH-821117AH). However, the permit was subsequently forfeited on March 8, 1988.

[2] Applications on file for Channel 287A at Brooklyn, Michigan, are Cascades Broadcasting, Inc. (BPH-870513MA), Brooklyn Radio Partners (BPH-870520MD), Geological Technology, Inc. (BPH-870601MB), and Richard James Tolly (BPH-870601MC).

[3] Reference coordinates at the restricted site are 41-34-25 and 84-52-32.

[4] Reference coordinates for Channel 286A at Roanoke, Indiana, are 40-53-55 and 85-25-32.

[5] Reference coordinates for the application are 40-55-00 and 85-27-30.

[6] Reference coordinates utilized for Station WASK-FM at Lafayette, Indiana, are 40-24-08 and 86-50-59.

[7] Reference coordinates for the application are 43-40-34 and 86-14-21.

[8] Reference coordinates at the restricted site are 41-38-36 and 85-22-00.

[9] Reference coordinates at the licensed site of Station WYEZ(FM) are 41-36-58 and 86-11-38.

[10] Reference coordinates utilized in this determination are 42-03-05 and 84-20-35.

[11] Reference coordinates of the construction permit site for Station WLTI(FM) are 42-28-16 and 83-12-03.

[12] Reference coordinates at the WLTI(FM) licensed site are 42-27-38 and 83-12-47.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

SIDNEY T. WARNER, EXECUTOR OF THE ESTATE OF LEIGH WARNER, DECEASED
(Transferor)

and File No. BTCCT-871125KG

NUCO TV, INC.
(Transferee)

For Transfer of Control of Southwest Kansas Television Company, Inc., Licensee of Television Station KTVC, Ensign, Kansas

MEMORANDUM OPINION AND ORDER

Adopted: May 19, 1988 **Released: June 28, 1988**

By the Commission:

1. The Commission has before it for consideration an application to transfer control of Southwest Kansas Television Company, Inc., licensee of television station KTVC (Channel 6, CBS), Ensign, Kansas, from Sidney T. Warner, Executor of the Estate of Leigh Warner, Deceased (transferor), to NUCO TV, Inc. (transferee). The two stockholders who own all of the issued and outstanding stock of the transferee, Ross Beach and Robert E. Schmidt, also own Kays, Inc., licensee of television stations KAYS-TV, Hays, Kansas, KLOE-TV, Goodland, Kansas, and KWCH-TV, Hutchinson, Kansas. At present, KAYS-TV and KLOE operate primarily as satellites of KWCH-TV, each having a studio in its city of license.[1]

2. The Grade B contours of KTVC and KAYS-TV overlap. With the proposed transfer of control of KTVC, this overlap would, therefore, be inconsistent with the Commission's multiple ownership rule. However, the transferee proposes to operate KTVC primarily as a satellite of KWCH-TV and, therefore, requests a grant of the transfer application pursuant to the exception for satellite operations set forth in Note 5 to Section 73.3555.

3. Section 73.3555(a)(3) of the Commission's Rules provides that "no license for a television broadcast station shall be granted to any party . . . if such party directly or indirectly owns, operates or controls one or more television broadcast stations and the grant of such license will result in any overlap of the Grade B contours of the existing and proposed stations . . . ." However, Note 5 to Section 73.3555 states that "paragraph (a)(3) of this Section will not be applied to cases involving television stations which are primarily 'satellite' operations," and "such cases will be considered on a case-by-case basis in order to determine whether common ownership, operation, or control of the stations in question would be in the public interest."

4. With respect to the contour overlap between KTVC and KAYS-TV, the transferee contends that the overlap is minimal. In this regard, an engineering study conducted by an independent consulting firm, which was submitted with the application, indicates that the Grade B contour of KAYS-TV encompasses 9,776 square miles and a population of 104,407 persons. The study further indicates that the Grade B contour of KTVC encompasses 10,973 square miles and a population of 105,716 persons. The overlap area between KAYS-TV and KTVC would encompass 459 square miles and a population of 1,780 persons, which represent 4.7 percent of the area and 1.7 percent of the population within KAYS-TV's Grade B contour and 4.2 percent of the area and 1.7 percent of the population within KTVC's Grade B contour.

5. In further support of its request to operate KTVC as a satellite, the transferee states that Ensign will not support a full service station. The 1980 Census shows that Ensign has a population of only 209 persons. The transferee points out that the Wichita-Hutchinson Television Market, of which Ensign is a part, comprises four full-service commercial television stations[2] (three network-affiliated and one independent) licensed to Wichita or Hutchinson and eight other stations, seven of which operate primarily as satellites of the three network-affiliated stations. KSNC (Channel 2), Great Bend, Kansas, KSNG (Channel 11), Garden City, Kansas, and KSNK (Channel 8), McCook, Nebraska, are satellites of KSNW (Channel 3, NBC), Wichita, Kansas. KLBY (Channel 4), Colby, Kansas, and KUPK-TV (Channel 13), Garden City, Kansas, are satellites of KAKE-TV (Channel 10, ABC), Wichita, Kansas. Finally, CBS service is provided by the proposed transferee's station, KWCH-TV (Channel 12), Hutchinson, Kansas, and its satellite stations, KAYS-TV (Channel 7), Hays, Kansas, and KLOE-TV (Channel 10), Goodland, Kansas. Moreover, there is only one community in the overlap area, Burdett, which has a cable system with 192 subscribers. These subscribers represent about one-third of the population in the overlap area. Furthermore, there is substantial cable penetration in the area within KTVC's Grade B contour. For example, cable systems in Dodge City, Liberal and Garden City serve 5,514, 5,295 and 5,400 subscribers, respectively.

6. The transferee notes that while KTVC is not now under common control of one of the licensees of the three network-affiliated parent stations, KTVC has rebroadcast the programming of KWCH-TV for more than 25 years with KTVC originating its own locally produced news and public affairs programming. The transferee states that, consistent with the requirements of operating KTVC as primarily a satellite, it will continue to broadcast locally produced news and public affairs programming. In view of the foregoing, the transferee believes that operation of KTVC as primarily a satellite would be in the public interest.

7. In the past, we have authorized satellite stations, in situations where overlap would exist between the parent and the satellite station, as a means of providing television service to small communities having an insufficient economic base to support a full-service television operation.[3] One means of carrying out the goal of bringing service to these communities is reflected in Note 5 to Section 73.3555(a)(3) of the Rules, which creates an exception to

the multiple ownership rule for a station operating as a satellite or "primarily as a satellite" if an appropriate public interest showing is made. When satellites were first considered, they were authorized only in communities having no local television service. *Multiple Ownership Rules*, 45 FCC 1728, 1735 (1964). That standard has evolved over the years in order to provide the public in smaller markets with a choice of broadcast service. Thus, even where a full-service station already serves an area, we have authorized competitive satellite operations so long as the applicant has undertaken to maintain a local studio and provide some local programming. *See , e. g., Midcontinent Broadcasting Co. of Wisconsin*, 12 FCC 2d 111 (1968); *Meyer Broadcasting Company*, 67 FCC 2d 593 (1983); *aff' d sub nom. Dickinson Broadcasting Corp. v. F. C. C.*, 593 F.2d 1371 (D.C. Cir. 1979). More recently, we have stated that the economic justification for satellite operation may be inferred from the size of the community of license even where the community is treated as part of a larger market. *Pete J. Stathakas*, 59 RR 2d 169 (1985); *recon. denied*, 60 RR 2d 1293 (1986).

8. On the basis of the information before us, we believe that a sufficient showing has been made to justify operation of KTVC primarily as a satellite of KWCH-TV. Although Ensign is part of the 57th market, it is, in fact, a small community of 209 persons. More importantly, there are only 105,716 persons residing within KTVC's Grade B contour. The overlap area at issue here is not substantial, amounting to only 1.7 percent of the populations respectively encompassed by the Grade B contours of KTVC and KAYS-TV and 4.7 percent of the area within KAYS-TV's Grade B contour and 4.2 percent of the area within KTVC's Grade B contour. Moreover, the unusually large geographic area comprising the Wichita-Hutchinson market and its sparsely populated nature, have produced competitive conditions that have resulted in strong ties among the stations serving the western part of the State of Kansas and those licensed to the principal cities of Wichita and Hutchinson. Indeed, every station in the market that is licensed to a smaller community, except KTVC, already operates as a satellite of a network-affiliated Wichita or Hutchinson station. KTVC itself has been operating for the last 25 years by rebroadcasting the programming of KWCH-TV. Under these conditions, it seems unlikely that anything except a full rebroadcast or satellite-like facility could continue to operate at Ensign. We note, in this regard, that KTVC currently originates less than 5 percent of its programming locally. Thus, affording KTVC satellite status would not result in a loss of a local outlet in the Ensign area. We note further that the transferee specifically proposes to continue to provide locally originated news and public affairs programming (but less than 5 percent) for Ensign and that grant of this application would, therefore, assure the continued availability of this type of programming. Grant would also preserve Ensign's only local station[4] and would continue the provision of CBS network programming in KTVC's service area. In view of the above circumstances, and finding the applicants fully qualified in all other respects, we conclude that the proposed satellite operation will serve the public interest, convenience and necessity.

9. Accordingly, IT IS ORDERED, That the application (BTCCT-871125KG) to transfer control of Southwest Kansas Television Company, Inc., licensee of television station KTVC, Ensign, Kansas, from Sidney T. Warner, Executor of the Estate of Leigh Warner, Deceased, to NUCO TV, Inc. IS GRANTED

10. Copies of this *Memorandum Opinion and Order* shall be sent Certified Mail - Return Receipt Requested to the parties to this proceeding by the Mass Media Bureau.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

FOOTNOTES

[1] A satellite station is one which originates no local programming. "Primarily a satellite" is defined as a station originating less than 5 percent local programming from a local studio. *See , e. g., Eugene, Television, Inc.*, 4 FCC 2d 232 n.2 (1966) and *Amaturo Group, Inc.*, 68 FCC 2d 899 (1978).

[2] It should be noted that the Wichita-Hutchinson Television Market covers about 70 percent of the area of the State of Kansas. Within that market, only KTVC is licensed to serve Ensign. Station KSNG, Garden City, is the only other station in the market that serves substantial areas in common with station KTVC. Station KSNG is authorized to operate as a satellite of station KSNW, Wichita.

[3] This case is factually different from the typical satellite case in that the overlap is not between a parent and satellite station but between two satellite stations under common control. However, the precedents established for satellite operations are equally applicable to these proposed commonly owned facilities.

[4] We also note that it is possible to add more television channels to the Table of Assignments (Section 73.606(b)) for Ensign and the surrounding area, if an appropriate Rule Making petition were to be filed by an interested party.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

Harriscope of Chicago, Inc., *et al.* a Joint Venture, d/b/a VIDEO 44	**MM DOCKET NO. 83-575** File No. BRCT-820802J9

For Renewal of License of
Station WSNS-TV, Channel 44,
Chicago, Illinois

and

MONROE COMMUNICATIONS CORPORATION Chicago, Illinois	**MM DOCKET NO. 83-576** File No. BPCT-821101KH

For a Construction Permit

ORDER

Adopted: June 21, 1988; Released: June 29, 1988

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

1. On May 24, 1988, Monroe Communications Corporation filed a "Motion for Leave to File Supplement to Brief in Support of Initial Decision" and an accompanying supplemental brief. However, on May 12, 1988, the Review Board adopted a Decision in this proceeding.

2. ACCORDINGLY, IT IS ORDERED, That the "Motion for Leave to File Supplement to Brief in Support of Initial Decision" and the accompanying "Supplement to Brief," both filed May 24, 1988 by Monroe Communications Corporation, ARE DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 85-156

In the Matter of

Amendment of Section 73.202(b),	RM-4938
Table of Allotments,	RM-5403
FM Broadcast Stations.	RM-5808
(Claremore, Locust Grove and Nowata, Oklahoma and Barling, Arkansas)	

MEMORANDUM OPINION AND ORDER

Adopted: May 26, 1988; Released: June 29, 1988

By the Chief, Policy and Rules Division:

1. The Commission has before it for consideration the *Report and Order* in this proceeding, 2 FCC Rcd. 5921 (1987), allotting Channel 233A to Claremore, Oklahoma, Channel 264A to Locust Grove, Oklahoma and Channel 233C2 to Barling, Arkansas. The *Report and Order* also modified the license of FM Station KPHN, Channel 233A, Barling, Arkansas, to specify operation on Channel 233C2. William R. Williams, Trustee in Bankruptcy, licensee of FM Station KNFB, Channel 232A, Nowata, Oklahoma, and Moran Broadcasting Company, proposed assignee of Station KNFB (Williams and Moran) filed a Petition for Reconsideration directed against the allotment of Channel 233A to Claremore. KXOJ, Inc., Teresa Brown, Mike Warren and Fred Weinberg filed oppositions to the petition for reconsideration. Williams and Moran filed a Reply to the Oppositions. KXOJ, Inc. filed a Response to the Reply to Oppositions. Finally, Williams and Moran filed comments directed against the KXOJ, Inc. response.

BACKGROUND

2. The original *Notice of Proposed Rule Making* in this proceeding, 50 Fed. Reg. 23729, published June 5, 1985, proposed the allotment of Channel 264A to Claremore as a first local FM service. In late-filed comments and counterproposal, KXOJ, Inc., licensee of FM Station KXOJ, Sapulpa, Oklahoma, proposed the allotment of Channel 264A to Locust Grove and Channel 233A to Claremore. The allotment of Channel 233A to Claremore required the relocation of the transmitter site for Station KNFB, at Nowata. To this end, KXOJ, Inc., and Special Services Radio, Inc., at that time licensee of Station KNFB, entered into an agreement looking toward relocation of the KNFB transmitter. In a *Further Notice of Proposed Rule Making*, 52 Fed. Reg. 18933, published May 20, 1987, the Commission requested comments on the KXOJ, Inc. counterproposal as well as a conflicting petition for rule making filed by Teresa Brown proposing the substitution of Channel 233C2 in lieu of Channel 233A at Barling, Arkansas, and modification of her construction permit for Station KPHN, Barling, to specify operation on Channel 233C2. The *Report and Order* accommodated all three communities. In doing so, it was necessary to impose a site restriction of 11.4 kilometers (7.1 miles) south on the Channel 233C2 allotment at Barling and 11.6 kilometers (7.2 miles) south on the Channel 233A allotment at Claremore. The *Report and Order* also noted that the proposed transmitter relocation by Station KNFB (File No. BMPH-870213IB) removed a short-spacing which would otherwise exist with the Channel 233A allotment at Claremore.

3. In their petition for reconsideration, Williams and Moran refer to the agreement dated April 2, 1986, looking toward the relocation of the Station KNFB transmitter in exchange for15,000. That agreement specifically provided that KXOJ, Inc. would locate a new transmitter site that would "maximize KNFB(FM)'s ability to cover Bartlesville, Oklahoma with a reliable signal of the highest intensity possible." According to the petition for reconsideration, Williams, as Trustee in Bankruptcy for Station KNFB, relied on the representation by KXOJ, Inc. with respect to the proposed site, and thereafter filed an application for the transmitter relocation contemplated by the agreement. Williams also supported the KXOJ, Inc. counterproposal. Subsequently, Williams recognized that the proposed site reduced service into Bartlesville and thereby diminished the value of the bankruptcy estate. Williams then amended the KFNB transmitter site relocation application filed pursuant to the agreement, to specify the original site for Station KNFB. Inasmuch as the licensed KNFB site and the site specified in the pending amended application involve a short-spacing of approximately 10.4 kilometers with the Channel 233A allotment at Claremore, Williams and Moran assert that the Claremore allotment is defective and should be deleted.

4. In its Opposition to the petition for reconsideration, KXOJ, Inc. also refers to its agreement with Special Services Radio, Inc. looking toward the Station KNFB transmitter relocation in order to accommodate Channel 233A at Claremore. KXOJ, Inc. states that Williams, after becoming Trustee in September of 1987 (*See* File No. BALH-870813GI) ratified the earlier agreement by filing the application to relocate the Station KNFB transmitter and supporting the KXOJ, Inc. counterproposal. KXOJ, Inc. asserts that Williams was aware that any transmitter site relocation by Station KNFB would have to be consistent with the minimum spacing requirements with respect to Channel 233A at Claremore. KXOJ, Inc. denies that it misled either Special Services Radio, Inc. or Williams. In addition to emphasizing the public interest benefits of the three channel allotments, KXOJ, Inc. contends that the petition for reconsideration is based merely on the fact that Williams changed his mind concerning the transmitter relocation. With respect to petitions for reconsideration based on new facts, KXOJ, Inc. notes that such facts must have been unknown to and could not have been known by the petitioner prior to the Commission action. Inasmuch as all information has been available to Williams, KXOJ, Inc. asserts that the petition for reconsideration is untimely and procedurally defective.[1]

5. In their Reply to Oppositions, Williams and Moran reiterate their argument concerning the agreement to relocate the Station KNFB transmitter site and the obligation of the Trustee to maintain the assets of the bankruptcy estate. In addition, Williams and Moran ad-

vance a solution which would permit the allotment of Class A channels to both Claremore and Locust Grove as well as permitting the upgrade to Channel 233C2 at Barling. Specifically, the solution would allot Channel 264A to Claremore and Channel 231A to Locust Grove with a site restriction of 5 kilometers west. In a response, KXOJ, Inc. contends that the suggested solution is, in essence, an untimely counterproposal and, in any event, is not preferable to the channel allotments contained in the *Report and Order*. KXOJ, Inc. also notes that a Channel 231A allotment at Locust Grove would conflict with a pending rule making petition involving upgrades in Stillwater and Okmulgee, Oklahoma (RM-6151). In addition, KXOJ, Inc. argues that a Channel 264A allotment to Claremore would, due to spacing restrictions, be located in a less populated area and, compared to the Channel 233A allotment, serve 18,777 fewer people. KXOJ, Inc. states that a Channel 264A allotment at Claremore would preclude Station KXOJ from relocating its transmitter closer to the populated area near Sapulpa, Oklahoma. Finally, KXOJ, Inc. states that the proposed solution would disrupt the rule making proceeding and impose additional costs on the applicants for Channel 233A at Claremore and Channel 264A at Locust Grove.

DISCUSSION

6. After careful consideration of this matter, we will not direct Moran Broadcasting Company or the Trustee in Bankruptcy to involuntarily relocate the Station KNFB transmitter to a site that would accommodate Channel 233A at Claremore. Instead, we will grant the petition for reconsideratiion to the extent of substituting Channel 264A in lieu of Channel 233A at Claremore, and Channel 233A in lieu of Channel 264A at Locust Grove.[2] The Claremore allotment requires a site restriction of 11.4 kilometers (7.1 miles) northeast, and the Locust Grove allotment requires a site restriction of 12.8 kilometers (7.9 miles) west. [3] These substitutions will also permit the upgrade at Barling, Arkansas from Channel 233A to Channel 233C2 with a site restriction of 31.3 kilometers (19.4 miles) southeast.[4] We discuss the arguments advanced in the oppositions to the petition for reconsideration below.

7. All parties opposing the petition for reconsideration refer to the agreement looking toward the Station KNFB transmitter relocation entered into by the former licensee of Station KNFB and ratified by Williams as Trustee in Bankruptcy. The parties contend that the fact Williams changed his mind after the *Report and Order* is not a valid basis for a petition for reconsideration. We disagree in this instance. The petition for reconsideration is premised on an amendment by Williams to the pending Station KNFB application which results in a short-spacing to the Claremore allotment. In this situation, we concur with KXOJ, Inc. that the reason for the amendment could have been ascertained by Williams well before the *Report and Order* in this proceeding. Under some circumstances, this would lead to our denying the petition for reconsideration. *See, e.g., Direct Broadcast Satellite Service*, 53 RR 2d 1637, 1641 (1983). However, the fact remains that in the absence of a transmitter relocation by Station KNFB, a Channel 233A allotment in Claremore is short-spaced to the licensed site of Station KNFB. We would not have allotted Channel 233A to Claremore without such a relocation. In view of the facts of this case, consideration of the petition for reconsideration is required to protect the public interest objective of maintaining the FM Table of Allotments in compliance with the minimum spacing requirements. *Cf. Pacific Lutheran University, Inc.* 37 FCC 2d 213 (1972).

8. In the present situation, it is readily apparent that from an administrative point of view, the optimum result would be for Moran Broadcasting Company to go forward voluntarily with the Station KNFB transmitter relocation to implement the agreement. However, it remains Commission policy not to require a station to involuntarily relocate its transmitter site. *North Charleston, South Carolina*, 47 Fed. Reg. 10560, published March 11, 1982. The reason for this policy is the administrative difficulty in selecting and approving a new transmitter site for an existing station and then directing the station to fund and construct those facilities. We have adhered to this policy even though the transmitter relocation would further a public interest objective. We continue to believe that a Commission compelled transmitter site relocation requires an unusually strong and compelling showing that the public interest gains achievable are sufficient to overcome the administrative difficulties as well as the ensuing impact upon the affected station and the public. *See Asheville, North Carolina*, 36 RR 2d 810 (1976). KXOJ, Inc. has not made such a showing with respect to the necessity of allotting Channel 233A to Claremore. The arguments advanced by KXOJ, Inc. that a Channel 264A allotment at Claremore would preclude a Claremore station for serving the area south of Claremore due to the site restriction on such an allotment, and would preclude Station KXOJ from relocating closer to Tulsa, do not justify an alternative result. Both of these areas receive a plethora of other broadcast services, and each station will be able to discharge its principal service obligation to its city of license from the restricted site.

9. In making a public interest determination, we can consider agreements between parties. However, we are not bound by such agreements. In this proceeding, we considered the agreement as evidencing consent to the proposed transmitter relocation by Station KNFB. We will not in this case undertake to enforce the agreement, or take action which results in *de facto* enforcement of the agreement, for two reasons. First, enforcing the agreement would be counter to our policy, as discussed in the preceding paragraph, of not requiring a station to involuntarily relocate its transmitter. Second, we would, in effect, be determining the validity of the agreement and adjudicating the rights of the respective parties under the laws of Oklahoma. Even assuming that that the Commission has the authority to do so, in this instance there is no overriding public interest reason to do so because we are able to achieve the public interest benefits in this proceeding of first local services to Locust Grove and Claremore, and the upgrading at Barling without resorting to enforcement of the agreement. However, our action in this proceeding does not preclude KXOJ, Inc. or any other party from pursuing such rights as it may have under Oklahoma law in a local forum.

10. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (2) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **August 15, 1988,** the FM Table of Allotments, Section 73.202(b) of the Rules, IS AMENDED with respect to the following communities:

Community	Channel No.
Claremore, Oklahoma	264A
Locust Grove, Oklahoma	233A

11. IT IS FURTHER ORDERED, That the aforementioned petition for reconsideration by William R. Williams, Trustee in Bankruptcy, and Moran Broadcasting Company IS GRANTED to the extent indicated above.

12. For further information concerning this proceeding, contact Robert Hayne, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Bradley P. Holmes
Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] In their oppositions, Mike Warren, Teresa Brown and Fred Weinberg also contend that the fact Williams changed his mind on the transmitter relocation can not be the basis for a petition for reconsideration.

[2] Currently, there are four applications pending for Channel 233A allotment at Claremore and three applications for the Channel 264A allotment at Locust Grove. These applicants will be permitted to amend their applications without loss of cut-off protection to specify the new channel and, if necessary, a new transmitter site.

[3] The reference coordinates for the Claremore allotment are 36-22-14 and 95-30-02. For the Locust Grove allotment, the reference coordinates are 36-10-39 and 95-18-28.

[4] The reference coordinates for the Barling allotment are 35-07-26 and 94-03-41.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-457

In the Matter of

Amendment of Section 73.202(b), RM-5874
Table of Allotments,
FM Broadcast Stations.
(Whitehall, Michigan)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: May 25, 1988; Released: June 29, 1988

By the Deputy Chief, Policy and Rules Division:

1. Before the Commission is the *Notice of Proposed Rule Making*, 2 FCC Rcd. 6541 (1987), proposing the allotment of FM Channel 273A to Whitehall, Michigan. The *Notice* was issued in response to a petition filed by Pyramid Broadcasting, Inc. Petitioner filed comments reaffirming its interest in the channel. No other comments were received.

2. Channel 273A can be allotted to Whitehall, Michigan, in compliance with the minimum distance separation requirements of the Commission's Rules.[1] Since Whitehall is located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence of the Canadian government has been obtained. In view of the above considerations we believe the public interest would be served by a grant of the petitioner's request, since it could provide a second FM broadcast service to Whitehall.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **August 15, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the community listed below:

City	Channel No.
Whitehall, Michigan	237A, 273A

4. The window period for filing applications will open on **August 16, 1988,** and close on **September 15, 1988.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates used for the allotment of Channel 273A at Whitehall are 43-24-24 and 86-20-42.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-437

In the Matter of

Amendment of Section 73.202(b), RM-5842
Table of Allotments,
FM Broadcast Stations.
(Selma and Union Springs, Alabama)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: May 31, 1988; Released: June 29, 1988

By the Deputy Chief, Policy and Rules Division:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making and Order to Show Cause*, 2 FCC Rcd 6323 (1987), issued in response to a petition for rule making filed on behalf of Alexander Broadcasting Company (petitioner), licensee of Station WALX(FM), Channel 265A, Selma, Alabama, proposing the substitution of Channel 265C2 for Channel 265A and modification of its license accordingly. The *Notice* also proposed the substitution of Channel 231A for Channel 265A at Union Springs, Alabama, licensed to Montgomery Christian Radio, Inc. (MCRI) for Station WSFU-FM,[1] in order to accommodate the proposed substitution at Selma. An *Order to Show Cause* was issued to Station WSFU-FM directing the licensee to demonstrate why it should not be modified to specify operation on Channel 231A in lieu of Channel 265A at Union Springs.

2. In response to the *Notice*, petitioner filed supporting comments reaffirming its intention to construct the requested modified facilities. MCRI filed comments and a counterproposal requesting the substitution of Channel 230C2 for Channel 265A at Union Springs, to which the petitioner responded.

3. MCRI states that neither it, nor Mar, Inc., the former licensee of Station WSFU-FM, ever gave consent to the proposed allotment of Channel 265C2 at Selma, or to the proposed modification of its license to specify Channel 231A. MCRI states that its agreement to the change is conditioned upon the adoption of its counterproposal, as well as receiving reimbursement for the reasonable expenses incidental to the requested substitution of Channel 230C2 in lieu of Channel 231A at Union Springs.

4. MCRI acknowledges that the proposed use of Channel 230C2 at Union Springs, at its specified reference site,[2] would place the transmitter 36.0 kilometers from the city reference coordinates. Using the standard methodology for computation of contour coverage (Section 73.313 of the Commission's Rules) from that site, MCRI notes it would result in 70 dBu coverage to less than 25% of the land area of Union Springs. However, MCRI asserts that Section 73.313 is inappropriate in this instance, given the terrain factors over the total path of actual coverage to Union Springs. Therefore, MCRI claims that since Section 73.315(a) does not specify the exact method to be employed in calculating the existence of 70 dBu service, pursuant to the provisions of Section 73.313 of the Commission's Rules, it has employed an alternate predicted coverage calculation method to determine compliance with Section 73.315. In this regard, MCRI has used the National Bureau of Standards Technical Note 101, "Transmission Loss Predictions for Tropospheric Communication Circuits by Longley & Rice" to determine the signal strength of proposed Channel 230C2 from its specified site. Based on a terrain profile depicting an unobstructed path from a radiation center 150 meters HAAT, with an ERP of 50 kilowatts, MCRI claims that Channel 230C2 would place a signal of 79.7 dBu at the center of Union Springs. Thus, MCRI seeks waiver of the standard prediction methodology and acceptance of its alternate predicted coverage calculations to determine compliance with the Commission's Rules.

5. In response, petitioner objects to the requested substitution of Channel 230C2 at Union Springs, maintaining that MCRI failed to substantiate why it cannot operate on Channel 231A, as set forth in the *Notice*. Additionally, petitioner claims the fact remains that MCRI's proposal would violate Section 73.315(a) of the Commission's Rules since it could not provide 70 dBu service over the entire principal community of Union Springs. Petitioner asserts that operation on Channel 231A would permit Station WSFU-FM to remain at its present site, [3] (which is 9.8 kilometers southwest of the community), in compliance with the Commission's Rules.

6. At the outset, we have determined that the Union Springs counterproposal is technically defective, since, at the requested site,[4] it is 11.8 kilometers short-spaced to a timely, earlier filed, and cut-off counterproposal in MM Docket No. 87-375 to upgrade the facilities of Station WRJM(FM), Channel 228A, Geneva, Alabama, to Channel 229C2 . Thus, if that proposal is adopted, it would preclude the use of Channel 230C2 at Union Springs. Furthermore, MCRI's specified site for Channel 230C2 at Union Springs places it 36.0 kilometers from the city, whereas 32.6 kilometers is the maximum limit for the provision of city-grade coverage by a Class C2 facility. Therefore, the allotment cannot be made in conformity with the requirements of Section 73.315(a) of the Commission's Rules. Moreover, MCRI's request for waiver of the city-grade coverage requirements is not appropriate at the rule making level. Nor is it generally appropriate at this stage to consider terrain factors such as those relied on by MCRI in evaluating compliance with Section 73.315(a). Therefore, the proposed use of Channel 230C2 at Union Springs is unacceptable and merits no further discussion.

7. In view of the above, the Commission believes the public interest would be served by substituting Channel 265C2 for Channel 265A at Selma, Alabama, since it could provide an additional wide coverage area FM service to the community. Thus, in accordance with the provisions of Section 1.420(g) of the Commission's Rules, we are modifying herein the license of Station WALX(FM) to specify operation on Channel 265C2 in lieu of Channel 265A at Selma, Alabama. As indicated in the *Notice*, Channel 265C2 can be allotted to Selma consistent with the minimum distance separation requirments of Section 73.207(b) of the Commission's Rules, provided the transmitter is sited at least 3.0 kilometers (1.9 miles)

south[5] of the community to avoid short-spacing to the construction permit issued to Station WFMH-FM, Channel 266C, Cullman, Alabama (BPH-870227NL).[6] Moreover, Channel 265C2 may be utilized at the petitioner's proposed site[7] consistent with our Rules.

8. Revised Section 1.87 of the Commission's Rules no longer affords a station affected by a proposed change in the Table of Allotments an automatic right to a hearing on request.[8] Rather, the affected station must raise a substantial and material question of fact as required by Section 309 of the Communications Act of 1934, as amended, in order to be entitled to a Section 316 hearing. As indicated in the *Notice and Order to Show Cause* herein, the Union Springs licensee was advised that pursuant to the requirements of Section 1.87 of the Commission's Rules, it was required to show, with particularity, why its licensee should not be modified, as proposed. MCRI's protest of the *Order to Show Cause* is predicated solely on its own proposal to increase its facilities, which we have determined is technically defective. Thus, since MCRI has not raised the requisite substantial and material question of fact nor a valid reason for denial of the Selma proposal, we are herein modifying the license of Station WSFU-FM to specify operation on Channel 231A in lieu of Channel 265A at Union Springs, as proposed in the *Notice*. Channel 231A can be substituted for Channel 265A at Union Springs at the present site of Station WSFU(FM) which is 9.8 kilometers (6.1 miles) southwest[9] of the community.

9. Petitioner has agreed to reimburse WSFU-FM for the reasonable costs to be incurred in changing its frequency, as required by Commission policy. *See Circleville and Columbus, Ohio*, 9 RR 2d 1579 (1967).

10. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **August 15, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the communities listed below, as follows:

City	Channel No.
Selma, Alabama	261A, 265C2
Union Springs, Alabama	231A

11. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Alexander Broadcasting Company for Station WALX(FM), Selma, Alabama, IS MODIFIED, effective **August 15, 1988,** to specify operation on Channel 265C2 in lieu of Channel 265A, subject to the following conditions:

(a) Within 90 days of the effective date, of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

12. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station WSFU-FM, Union Springs, Alabama, IS MODIFIED, effective **August 15, 1988,** to specify operation on Channel 231A in lieu of Channel 265A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in license [BLH-7136] except the channel as specified above. Any other changes, except for those so specified under Section 73.1690 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301); and

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with its license [BLH-7136] except for the channel as specified above and a license application (FCC Form 302) is filed within ten (10) days of commencement of program tests.

13. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

14. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] At the time this proposal was filed, Mar, Inc. was the licensee of Station WSFU-FM. An assignment of the license to MCRI (BALH-870715HV) was subsequently granted August 26, 1987.

[2] *I.e., 31-55-15 and 85-59-40.*

[3] Reference coordinates at the licensed site of Station WSFU(FM) are 32-05-46 and 85-48-16.

[4] Coordinates at the preferred site of WSFU-FM are 31-55-15 and 85-59-40.

[5] Reference coordinates for Channel 265C2 are 32-23-23 and 87-01-36.

[6] Reference coordinates at the construction permit site of Station WFMH-FM are 34-04-54 and 86-54-13.

[7] Reference coordinates at petitioner's proposed site are 32-20-25 and 87-03-00.

[8] *See Modification of FM* or Television Licenses Pursuant to Section 316 of the CommunicationsAct, 2 FCC Rcd 3327 (1987).

[9] Reference coordinates for Channel 231A are 32-05-46 and 85-48-16.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-113

In the Matter of

Amendment of Section 73.202(b),	RM-5163
Table of Allotments,	RM-5198
FM Broadcast Stations.	RM-5457
(Hollywood and California, Maryland and King George, Virginia[1])	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: June 1, 1988; Released: June 29, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission has under consideration the *Notice of Proposed Rule Making*, 51 FR 12722, April 15, 1986, proposing the allotment of Channel 275A as a first FM broadcast service to either Hollywood or California, Maryland. The *Notice* was issued in response to petitions filed by Richard A. Myers (Myers) for Hollywood and Tippity Whichity Communications Company (Tippity) for California. Both petitioners filed comments restating their intentions to apply for the channel if allocated to their requested community. A counterproposal was filed by King George Associates (KGA) to allocate Channel 275A to King, George, Virginia.[2] Reply comments were filed by Myers, Tippity and KGA.

2. As stated in the *Notice*, each petitioner requested the allotment of FM Channel 275A to its respective community. Since the proposals are mutually exclusive (the communities of Hollywood and California are only 7.4 kilometers apart instead of the required 105 kilometers) they were considered together. We agreed that both proposals merited consideration and requested the petitioners to demonstrate in comments to the *Notice* why its community should receive the allotment.

3. In comments Myers submits that the allotment of Channel 275A to Hollywood best serves the Commission's objective of providing a fair distribution of radio service under Section 307(b) and that he will apply for a permit to construct and operate a station at Hollywood, if the channel is allocated to that community. According to petitioner, Hollywood is neither incorporated nor a census-designated place, but is instead an area defined by four Census Enumeration Districts which lie within the Patuxent Sixth Election District. The 1980 Census shows the four Enumeration Districts comprising Hollywood as having 5,537 residents. Myers states that both Hollywood and California receive at least two fulltime aural services and neither community has a local service. Myers submits that there are approximately 35 businesses located in Hollywood, including the county's largest industrial park, a local chapter of the Lion's Club, Knights of Columbus and Boy Scouts of America. Further, he states that Hollywood has three schools, four churches, and its own post office zip code, all of which indicate Hollywood is an active community that could benefit from its first FM service. Myers indicates that more transmitter sites would be available if Channel 275A were allotted to Hollywood then if it were allotted to California, where the proximity of the Patuxent River Naval Air Station and St. Mary's County Airport limits available transmitter sites. However, Myer's study showed that there is, in fact, a tower from which a transmitter for a California allotment could operate. Finally, Myers contends that a Hollywood allotment will provide 8,298 more people with a new reception service than would a California station.

4. Tippity states it will apply for the use of Channel 275A whether allotted to Hollywood or California, but prefers the allotment be made to California. In support, it submits that California is located in St. Mary's County, has a 1980 U.S. Census population of 5,770, and has clearly defined boundaries with its own post office zip code, all of which indicate its community status. Further, California has four schools and two churches. According to Tippity, since the community of California has defined boundaries, no question regarding community status should arise. In contrast, Hollywood is said to have undefined boundaries located somewhere in District Six of St. Mary's County. Tippity questions whether proper city grade coverage will be provided unless the entire election District is to be provided 70 dBu coverage.

5. KGA in its counterproposal, requests the allotment of FM Channel 275A to King George, Virginia, as that community's first FM broadcast service. KGA states that King George, is the County Seat of King George County, Virginia, located in an area known as Virginia's "Northern Neck", roughly 60 miles south of Washington, D.C. King George, Virginia is unincorporated but is said to have all the attributes of a community, such as a sheriff's department, schools, weekly newspaper, churches, civic organizations and a fire and rescue department. KGA states the community has an approximate population of 500. KGA submits that King George is the political and economic hub of the county and is located in a county without local broadcast stations. Thus, KGA argues that King George should be preferred over two "four corners" places in southern Maryland which have dubious community characteristics.

6. Myers filed reply comments, restating his intent to construct a radio station in Hollywood. He continues to believe the community most in need of this service is Hollywood, particularly since even Tippity has stated that it will apply for the use of Channel 275A at Hollywood.

7. Tippity filed reply comments, stating that California, Maryland is a recognized community by its designation as a Census Designated Place, whereas neither Hollywood nor King George have the recognized community status given California by the United States Government. In addition, it contends an allotment of Channel 275A to California could not only result in a new local service for California but also provide a new service to the area described as Hollywood. With respect to Myer's air hazard allegation, Tippity contends that an existing tower of 220 feet in height would be used to provide near maximum facilities at California. Tippity also contends that the allegation of air hazard is a matter best addressed at the application stage and is therefore inappropriate for consideration during rule making.

8. KGA also filed reply comments stating the Commission is compelled by Section 307(b) to allot FM Channel 275A to King George, Virginia. First, KGA indicates that Channel 275A, so far as it knows, is the only channel available for the community and to deny the counterproposal would prevent the people of King George, Virginia, from ever having their own local broadcast service. Second, in a comparison among the communities, California, despite its listing as a Census Designated Place, is best described as a "four corners" at the junction of Maryland Route 4 and 235. KGA states that Hollywood has attempted to claim credit for all persons within the Sixth Election District of St. Mary's County which includes the communities of Hillville, Sangates and Clarks Landing. By contrast, King George is a complete community, containing its county government, schools and local businesses. King George has over 100 businesses either located in the community or nearby and identifying with it.

9. Finally, Myers filed a reply to the counterproposal again stating that King George cannot be defined as a Census Designated Place or a Census Enumeration District. Myers notes that, whereas the counterproposal gives an approximate population of 500 for King George, after much research in the Rappahannock District where King George is located it could find no population figures for King George, Virginia. The schools and businesses are located in the county and serve the entire county, rather than the primary community as is indicated in the counterproposal.

10. The Commission's long standing policy is to require that allotments be made to communities composed of geographically identifiable population groupings. This requirement is generally satisfied if the proposed community is either incorporated or listed in the U.S. Census. Hollywood, Maryland and King George, Virginia meet neither criteria. California, Maryland is identified by the U.S. Census as a Census-Designated Place. The 1987 Rand McNally Road Atlas does show Hollywood, Maryland and King George, Virginia on a map. Although Myers indicates a population of 5,537 for Hollywood, Myers bases that conclusion on an allegation that Hollywood is comprised of four Census Enumeration Districts (CEDs) within the Patuxent Sixth Election District. Maps submitted by Myers indicate that within those CEDs there are several communities other than Hollywood. We are not convinced that CEDs grouped together necessarily comprise a single community for allotment purposes. Therefore, we reject Myer's contention that the boundaries of Hollywood are coterminous with the boundaries of the four referenced CEDs, and will consider Hollywood to be the much smaller area directly identified in maps submitted in this proceeding as Hollywood. In contrast, California, as a CDP, has defined boundaries with an identifiable population grouping. Moreover, there do not appear to be any smaller communities located within the California CDP which would call into question the appropriateness of the Census Bureau's definition of California as a CDP.

11. The Commission's criteria for evaluating conflicting proposals was set forth in *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982):

(1) first full-time aural service;

(2) second full-time aural service;

(3) first local service; and

(4) other public interest matters.

(Co-equal weight given to priorities (2) and (3).

Under our listed priorities Hollywood and California, Maryland, and King George, Virginia, would each be considered for a first FM service. Therefore, we decide this case based on priority 4. Here we note that California, Maryland (population 5,770), has a significantly larger population than Hollywood, Maryland (300) and King George, Virginia (200). [3] A staff analysis has also determined the number of services received in the three communities. Our analysis shows that King George, Virginia receives service from five FM stations and eight AM stations, Hollywood, Maryland is served by four FM stations and nine AM stations, and California, Maryland is served by three FM stations and nine AM stations. Based on its higher population and fewer services received, we find that Channel 275A should be allotted to California, Maryland. Channel 275A can be allotted to California, Maryland, in compliance with the minimum distance separation requirements of Section 73.207 of the Commission's Rules.[4]

12. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **August 15, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
California, Maryland	275A

13. The window period for filing applications will open on **August 16, 1988,** and close on **September 15, 1988.**

14. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

15. IT IS FURTHER ORDERED, That the counterproposal filed by King George Associates IS DENIED.

16. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] This community has been added to the caption.

[2] Public Notice of the counterproposal was given on June 5, 1986, Report No. 1595 (RM-5457).

[3] Population figures were taken from the 1988 Rand McNally Commercial Atlas and Marketing Guide.

[4] The coordinates for Channel 275A at California are 38-20-48 and 76-34-06.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-273

In the Matter of

Amendment of Section 73.202(b), RM-5922
Table of Allotments,
FM Broadcast Stations.
(Ormond-By-The-Sea, Florida)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: June 8, 1988; Released: June 29, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission herein considers the *Notice of Proposed Rule Making*, DA 87-960, released July 24, 1987 proposing to allot Channel 239A to Ormond-By-The-Sea, Florida, at the request of Miller Management Group, Inc. (petitioner). Comments were filed by Family Group Broadcasting (FGB), Ormond Broadcasting Company, and by the petitioner, each expressing a desire to apply for Channel 239A, if allotted to Ormond-By-The Sea.[1]

2. We find that the public interest would benefit form the proposed allotment which would provide a first FM service to Ormond-By-The-Sea. The channel can be allotted in compliance with the minimum distance separation requirements of Section 73.207 of the Rules.[2]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **August 15, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Ormond-By-The-Sea, Florida	239A

4. The window period for filing applications will open on **August 16, 1988,** and close on **September 15, 1988.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Montrose H. Tyree, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] After the comment period ended Carl J. Tatera, Jr., filed comments which also supports the allotment.

[2] Coordinates for Channel 239A at Ormond-By-The-Sea,Florida are 29-20-48 and 81-04-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-460

In the Matter of

Amendment of Section 73.202(b),	RM-5782
Table of Allotments,	
FM Broadcast Stations.	
(Northport, Alabama)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: June 7, 1988; Released: June 29, 1988

By the Deputy Chief, Policy and Rules Division:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 2 FCC Rcd 6507 (1987), issued herein in response to a petition filed on behalf of Northport Communications (petitioner), proposing the allotment of FM Channel 264A to Northport, Alabama, as that community's first local broadcast service. Supporting comments were filed by the petitioner. No opposing comments were received.

2. We believe the public interest would be served by allotting Channel 264A to Northport, Alabama, since it could provide a first local broadcast service to the community.

3. As indicated in the *Notice*, Channel 264A can be allotted to Northport, Alabama, in conformity with the minimum distance separation requirements set forth in Section 73.207(b) of the Commission's Rules, provided the transmitter therefor is sited at least 6.1 kilometers (3.8 miles) west[1] of the community to avoid short-spacing to the construction permit (BPH-860924ID), issued to Station WHMA-FM, Channel 263C, Anniston, Alabama.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **August 15, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED to include the community listed below, as follows:

City	Channel No.
Northport, Alabama	264A

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. The window period for filing applications on Channel 264A at Northport, Alabama, will open on **August 16, 1988,** and close on **September 15, 1988.**

7. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. Questions related to the window application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau, (202) 632-0394.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] Reference coordinates of the restricted site at Northport are 33-13-31 and 87-38-35.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-350

In the Matter of

Amendment of Section 73.202(b),	RM-5812
Table of Allotments,	RM-6145
FM Broadcast Stations.	
(Millinocket and Lincoln[1],	
Maine)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: June 1, 1988; Released: June 29, 1988

By the Deputy Chief, Policy and Rules Division:

1. In response to a petition filed by Katahdin Communication, Inc. (Katahdin), the Commission has before it for consideration the *Notice of Proposed Rule Making*, 2 FCC Rcd. 5463 (1987), proposing the substitution of FM Channel 235C2 for Channel 249A at Millinocket, Maine. Petitioner also requests modification of its license for Station WSYY-FM to specify operation on Channel 235C2. Con Brio Broadcasting, Inc. (Con Brio), licensee of Station WGUY-FM, filed a petition requesting Channel 235C2 be substituted for Channel 257A at Lincoln, Maine.[2] Con Brio also requested the modification of its license for Station WGUY-FM be modified to specify the new channel. We have accepted the petition as a counterproposal in this proceeding. Katahdin filed comments reaffirming its interest in the Class C2 channel at Millinocket. Katahdin also filed an opposition to the counterproposal. Reply comments were filed by Con Brio.

2. Con Brio, in support of its petition, states that Lincoln is the hub of business activity for central Penobscot County and a higher class of channel would allow it to serve citizens in the counties of Hancock, Washington, Asoostook and Penobscot not presently served by an FM service. Con Brio states that it could provide a second aural service to many of the residents of the area.

3. Katahdin submits that Con Brio's proposal should be denied and Channel 235C2 be allocated to Millinocket, and in the alternative, a different channel should be allocated to Lincoln, Maine. Katahdin argues that Con Brio has failed to demonstrate sufficient public interest reasons for the allotment of a channel to Lincoln, provided no documentary support that Lincoln is the hub of business for Penobscot County and failed to provide a list of aural services to support its statement that it would be able to provide a second aural service to many citizens in Hancock, Washington, Asoostook and Penobscot County. In support of the allotment for Millinocket, Katahdin states that although Millinocket is the larger community it receives fewer services than Lincoln. Katahdin in its petition provided Channel 266C2 as an alternate channel for other interests at Millinocket and now suggests that Channel 266C2 could be available for allocation to Lincoln, Maine.[3]

4. Con Brio submitted reply comments indicating Channel 289C2 could be allocated to Lincoln thus clearing the way for the allotment of Channel 235C2 to Millinocket as originally proposed. Con Brio suggests that Channel 289C2, instead of Channel 235C2, be substituted for Channel 257A at Lincoln and that the license of Station WGUY(FM) be modified to specify operation on Channel 289C2. Con Brio states that it will file an application to implement such modification.

5. After consideration of the information filed in this proceeding, we find it would be in the public interest to allocate FM Channel 235C2 to Millinocket, Maine, in accordance with Section 1.420(g) of the Commission's Rules. We shall also modify the license of Station WSYY-FM to specify the new channel. As stated in the *Notice*, Channel 235C2 can be allocated to Millinocket, Maine, in compliance with the minimum distance separation requirements of the Commission's Rules.[4] Concurrence of the Canadian government has been obtained for this allocation since Millinocket is located within 320 kilometers (200 miles) of the U.S.-Canadian border.

6. A staff analysis confirms that FM Channel 289C2 can be allocated to Lincoln, Maine. We believe the public interest would be served by the allocation of FM Channel 289C2 to Lincoln, in response to the counterproposal filed by Con Brio. Thus, in accordance with Section 1.420(g) of the Rules, we shall modify the license of Station WGUY-FM, Channel 257A, to specify operation on Channel 289C2. Channel 289C2 can be used at the current site of Station WGUY-FM.[5] Concurrence of the Canadian government has been obtained for this allocation since Lincoln is located within 320 kilometers (200 miles) of the U.S.-Canadian border.

7. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **August 15, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Lincoln, Maine	289C2
Millinocket, Maine	235C2

8. IT IS FURTHER ORDERED, That pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, the license of Station WSYY-FM, Millinocket, Maine, IS MODIFIED to specify operation on Channel 235C2, in lieu of Channel 249A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

9. IT IS FURTHER ORDERED, That pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, the license of Station WGUY-FM, Lincoln, Maine, IS MODIFIED to specify operation on Channel 289C2, in lieu of Channel 257A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

10. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

11. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] This community has been added to the caption.

[2] Public Notice was given on November 9, 1987, Report No. 1689 (RM-6145).

[3] Using the coordinates for Station WGUY-FM, Lincoln, Maine, Channel 266C2 conflicts with Station WKCG, Channel 267B, Augusta, Maine.

[4] The coordinates for Channel 235C2 at Millinocket are 45-40-26 and 68-43-14.

[5] The coordinates for Channel 289C2 at Lincoln are 45-20-34 and 68-30-25.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-16

In the Matter of

Amendment of Section 73.202(b), RM-6109
Table of Allotments,
FM Broadcast Stations.
(Waite Park, Minnesota)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: May 25, 1988; Released: June 29, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it the *Notice of Proposed Rule Making*, 3 FCC Rcd. 534 (1987), proposing the allotment of FM Channel 279A to Waite Park, Minnesota, as that community's first FM broadcast service. The *Notice* was issued in response to a petition filed by Waite Park Broadcasting Company (petitioner). Comments were filed by the petitioner restating its interest in the allotment. No other comments were received.

2. Channel 279A can be allotted to Waite Park, Minnesota, consistent with the minimum distance separation requirements of Section 73.207 of the Commission's Rules.[1]

3. In view of the fact that Channel 279A can be allocated to Waite Park to provide the community with its first FM broadcast service, we find the allotment to be in the public interest. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **August 15, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the community listed below:

Community	Channel No.
Waite Park, Minnesota	279A

4. The window period for filing applications will open on **August 16, 1988,** and close on **September 15, 1988.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 279A at Waite Park are 45-33-18 and 94-13-36.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 85-388

In the Matter of

Amendment of the Commission's Rules
for Rural Cellular Service

FOURTH NOTICE OF PROPOSED RULE MAKING

Adopted: April 21, 1988; Released: June 30, 1988

By the Commission:

I. BACKGROUND

1. This Fourth Notice of Proposed Rule Making proposes to amend the Commission's current cellular rules for Rural Service Areas (RSAs) to provide the rules governing service to the area within each RSA that is not part of the Cellular Geographic Service Area (CGSA)[1] of the licensee for that RSA. The term "fill-in" application refers to an application to serve such an area. RSA fill-in procedures are needed to ensure that these areas are served as quickly as possible and to enable licensees, or others to adjust their business plans accordingly.

2. We have previously solicited comments on the issue of fill-in applications in conjunction with our Metropolitan Statistical Area (MSA filing procedures. *See Further Notice of Proposed Rule Making*, CC Docket 85-388, 1 FCC Rcd 499 (1986) (*Further NPRM)).* In the *Second Report and Order*, CC Docket 85-388, 2 FCC Rcd 2306 (1987), we adopted procedures for filing applications for the unserved areas of MSAs. Under the MSA "fill-in" policy adopted in that order, MSA licensees may file applications to serve areas outside of their CGSA, but within the MSA, for a period up to five years from the date of the initial construction authorization in the market, without being subject to competing applications. After five years, non-licensees may file applications for the unserved portions of the MSA. *See* Section 22.31(a)(l)(i) of our Rules. We did not adopt a fill-in policy for RSAs in the *Second Report and Order* or elsewhere.

3. Under the existing rules for RSAs, an applicant may propose to serve any area within an RSA.[2] In our *Order on Reconsideration*, we indicated that once all RSA applications are processed, we would accept applications for those unserved areas within the RSA but outside the CGSA. [3] However, we did not adopt specific procedures and times for filing applications for the unserved portions of an RSA.

4. In their petitions for further reconsideration of the *Order On Reconsideration*, several parties noted the difficulty of predicting with precision the demand for cellular service within the RSA markets. They requested that the Commission establish a period of time during which RSA grantees can assess demand and file fill-in applications without being subject to mutually exclusive applications. Those petitioners stated that, without a ruling on this issue, they will not know whether to file applications for the entire RSA, or to file for only a segment of the RSA. If we apply the MSA fill-in policy to RSA grantees, the petitioners assert that they will be able to commence cellular service with an economically feasible system and then determine whether the demand warrants expansion into the initially unserved areas.

II. DISCUSSION

5. The Commission first considered the "fill-in" issue in its *Lottery Order*.[4] That order implemented a system of lotteries to select cellular licenses from among competing applicants. In that order, we also stated that under Sections 22.903(d) and 22.913(a) of our Rules, we would allow a cellular licensee to apply to modify its existing authorization to increase its CGSA within the boundaries of its MSA. We stated further that:

> Although this constitutes a "major [amendment]" and must be placed on Public Notice for Petitions to Deny, we will not permit the filing of mutually exclusive applications during the nationwide cellular licensing period. We have long held that the public interest is served by allowing a cellular system operator the flexibility necessary to modify its system in reponse to marketplace forces. *See* Cellular Communications Systems, 86 FCC 2d at 509. Such modifications are natural extensions of an existing permittee's or licensee's cellular authorization in response to growing or changing demand and should be subject to minimal regulatory oversight during the nationwide cellular licensing period. However, after the initial application phase, we will reopen any unapplied for areas to any applicant under regular notice and cut-off rules as discussed further [herein].[5]

6. We subsequently reaffirmed our policy regarding fill-in applications[6] and reiterated that the policy "serves the public interest by allowing the initial licensee flexibility to expand within the subject MSA or New England County Metropolitan Area (NECMA) in response to growing or changing demand in the marketplace."[7] We also stated that the fill-in policy "promotes the expeditious, orderly processing of cellular applications and prevents the 'regulatory paralysis' that could ensue if these areas were open to unrestricted applications at the same time that we are attempting to complete the nationwide licensing of cellular service."[8]

7. Under the MSA fill-in policy adopted in the *Second Report and Order*, MSA licensees may file applications to serve areas outside of their CGSA, but within the MSA, for a period of five years from the date of the initial authorization in the market without being subject to competing applications. Thereafter, non-licensees may file applications for unserved portions of the MSA. We adopted a five-year period because we concluded, *inter alia*, that 1) where there was a wireline headstart, the period would provide non-wireline carriers with sufficient opportunity to ascertain the necessary modifications that result in CGSA expansion based on prior modifications by wireline carriers and their own resale activities; 2) any technical problems related to site locations and terrain requiring expansion most likely would occur in the early part of the construction period and that the remainder of the five-

year period was adequate to remedy such problems; and 3) the five-year period, including the construction period, gives licensees time to identify unpredicted demand outside the CGSA or other changing demand patterns that might require CGSA expansion.[9]

8. There appear to be compelling reasons for adopting the same five-year period for RSA licensees. Indeed, the factors that made it reasonable to adopt a five-year period for the MSA fill-in policy, *see* para. 7, *supra*, also appear to exist with respect to RSAs. It is unlikely that a period of less than five years would be adequate to allow the licensees to assess such factors as: a) necessary modifications in response to any wireline headstart; b) the developing demand for the use of cellular radio generally, and, in particular, to provide fixed service to residential users should the Commission decide to allow such use on more than an incidental basis, as now permitted, as well as the amount of existing conventional mobile telephone service that will migrate to cellular; and c) technical changes that may be necessary in order best to serve the RSAs.[10]

9. While the same considerations appear applicable to the fill-in policy for the RSAs, there are additional considerations that warrant a substantial period of time for RSA licensees to assess the need for modifications without being subject to competing applications. First, the demographics of the RSAs are different from those of the MSAs; for example, their populations are likely to be smaller and less dense. Second, RSAs encompass larger, and possibly fragmented, areas which, unlike MSAs, may not have a strong community of interest. Third, many RSAs are being served by conventional mobile telephone service and the pent-up demand for cellular phone service that existed in many of the larger MSA markets may not exist in most of the RSAs. For this reason, and because we have eliminated the requirement that the grantee provide coverage to 75% of the RSA, a prudent RSA licensee would likely file its initial application to serve only the most densely populated areas in the RSA and not commit to provide service to the less populated areas until it was more able to predict accurately the demand for its service in those areas. Finally, in some areas, demand estimates may also depend upon whether the Commission allows the extensive use of cellular radio to provide fixed service to residential users.[11] These added uncertainties must be weighed and considered in balancing our goals of enabling the public to acquire the service as quickly as possible while encouraging carriers to provide the service in an economic and efficient manner. We seek comment on whether five years, some other period, or no fill-in period is most appropriate in these circumstances. We also propose that the five-year or other period be measured from the date of the original authorization for the particular system involved, not the first authorization in the market. This will ensure that all licensees are treated fairly. We seek comment on this proposal as well.

10. We also propose that if the original licensee transfers its entire authorization for its CGSA within the RSA, the fill-in period and the right of expansion without competing applications would transfer with the authorization (*i. e.*, the transferee would take the remaining portion of the fill-in period). However, if the licensee transfers any other CGSA in the RSA (granted after the first CGSA) or *less* than the total original CGSA authorization to another party, such party would have no right to expand the area covered by the transferred authorization without competing applications unless the transferee obtains a statement signed by the transferor (or its intermediate assignee or transferee) agreeing to such an expansion. As a result, in situations where there has been a partial transfer by the original licensee, any application for expansion by a licensee other than the original licensee must include a signed statement from the original licensee, or its successor, explicitly agreeing to the expansion. We seek comment on this proposal.[12]

11. Finally, we propose to amend Section 22.13(a)(1) to provide that all applications filed for each RSA be considered mutually exclusive regardless of whether their CGSAs overlap.[13] We are making this proposal for two reasons. First, because of the large number of anticipated filings, it would be difficult and time consuming to determine which applications or group of applications are mutually exclusive. This would be especially difficult to do with RSA applications because we have permitted applicants to define their CGSAs without population or geographic coverage requirements. Given our limited resources, an attempt to determine which applications are mutually exclusive would substantially delay the provision of cellular service to rural America. Second, because we are proposing herein to apply a five-year non-competing application fill-in policy to RSAs, we do not believe that it would be in the public interest to award permits to all applicants that propose CGSAs that do not overlap any other proposed CGSA within the RSA. If we do adopt a fill-in policy for RSAs that provides for the filing of fill-in applications by licensees without being subject to competing applications and we have multiple permittees within an RSA, it would not be clear which permittee could expand into any unserved area. If we decide after reviewing the comments in this proceeding not to adopt such a fill-in policy, we propose to allow all applicants that are not chosen in the lottery an opportunity to demonstrate that their applications are not mutually exclusive with the winning application and would hold supplemental lotteries consisting of all applications that were shown to be not mutually exclusive with the winner of the first lottery. We would continue this process until all non-mutually exclusive applications have been granted. We seek comment on this proposed alternative amendment.

12. We tentatively conclude, based on our analyses set forth above, in order to provide a reasonable opportunity for RSA carriers to adjust their business plans to developing demand, that a fill-in policy for RSAs, similar to that used for MSAs, as proposed above, is preferable to other alternatives. We believe that it is in the public interest to adopt a policy which allows only the RSA licensee to file an application for the unserved portion of the RSA for a period of five years after the grant of its initial construction authorization. During the proposed five-year period, the RSA grantee/licensee could file applications to expand its original CGSA or for other CGSAs within the RSA and other parties would not be allowed to file applications for unserved areas within the RSA.

III. REGULATORY FLEXIBILITY ACT INITIAL ANALYSIS

13. *Reason for action.* The Commission is proposing to adopt a five-year "fill-in" period for RSAs in which, as a general matter, cellular licensees will be able to file "fill-in" applications for five years from the date of their authorization without being subject to competing applications. We are making this proposal largely because we

have tentatively concluded that RSA licensees will need this time to assess accurately the demand for their services in the less populated areas of their RSAs and that to subject expansion applications to mutually exclusive filings would delay service to the public and result in the inefficient use of the spectrum.

14. *Objective*. The objective of the proposed additions to our rules is to eliminate delays in the processing of applications for unserved portions of the RSAs and to ensure that cellular radio spectrum is used in as efficient a manner as possible.

15. *Legal basis*. The authority for this notice is contained in Sections 1, 4(i) and 303 of the Communications Act of 1934, 47 U.S.C. Sections 1, 4(i) and 303, and Section 553 of the Administrative Procedure Act, 5 U.S.C. Section 553.

16. *Description, potential impact and number of small entities affected*. None.

17. *Federal rules which overlap, duplicate or conflict with these rules*. None.

18. *Any significant alternatives minimizing impact on small entities and consistent with stated objectives*. None.

19. *Reporting, record keeping, and compliance requirements*. None.

20. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found not to impose a new or modified information collection requirement on the public. Implementation of any new or modified requirement will be subject to approval by the Office of Management and Budget as prescribed by the Act.

21. For purposes of this non-restricted notice and comment rule making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period. *See generally* 47 C.F.R. Section 1.1206(a). The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. 47 C.F.R. Section 1.1202(f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by Commission or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding. 47 C.F.R. Section 1.1203.

22. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding, or (2), if oral, is made without advance notice to the parties to the proceeding and with opportunity for them to be present. 47 C.F.R. Section 1.1202(b). Any person who submits a written *ex parte* presentation must provide on the same day it is submitted a copy of same to the Commission's secretary for inclusion in the public record. Any person who makes an oral *ex parte* presentation that presents data or arguments not already reflected in that person's previously-filed written comments, memoranda, or filings in the proceeding must provide on the day of the oral presentation a written memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. 47 C.F.R. Section 1.1206.

23. Accordingly, pursuant to Sections 1, 4(i) and 303(r) of the Communications Act of 1934, 47 U.S.C. Sections 151, 154(i) and 303(r), and Section 553 of the Administrative Procedure Act, 5 U.S.C. Section 553, that there is ISSUED A NOTICE OF PROPOSED RULE MAKING.

24. Pursuant to Section 1.415 of the Commission's rules, 47 C.F.R. Section 1.415, that all interested persons may file comments on the matters discussed in this *Notice* and the proposed rule changes contained in the Appendix below by **July 18, 1988** and reply comments by **July 28, 1988.**

25. The Chief, Common Carrier Bureau, has delegated authority to request the submission of additional information, make further inquiries, and modify the dates and procedures if necessary to provide for a fuller record and a more efficient proceeding.

26. Finally, the Secretary shall send a copy of the Notice to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act (5 U.S.C. Section 601, *et seq.*).

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

APPENDIX

Proposed Rule Sections

Part 22 of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 22 continues to read as follows:

AUTHORITY: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303.

2. Section 22.31 is amended by revising paragraph (a)(1) and adding new paragraph (a)(1)(ii) to read as follows:

§ 22.31 Mutually exclusive applications.

* * * * *

(a)(1) In the Domestic Public Cellular Radio Telecommunications Service, applications shall be considered mutually exclusive if their proposed Cellular Geographic Service Areas (CGSAs) overlap in such a way that a grant of one would preclude the grant of one or more of the other applications, except that initial applications for the

same Rural Service Area (RSA) will be considered mutually exclusive regardless of whether their CGSAs overlap, provided however, that

* * * * *

(ii) Notwithstanding any other provision of this rule section and rule provision of this part, applications by other entities to serve unserved RSAs outside the presently authorized CGSA but within the RSA are prohibited from being filed and will not be considered as mutually exclusive with a licensee's application filed under Section 22.903(d) herein until five years after the grant of the original authorization for that system. During this five-year period the original licensee will be authorized to expand its system into unserved areas of the RSA. If the original licensee transfers its entire authorization for its original CGSA within the RSA, the fill-in period and the right of expansion without being subject to competing applications transfers with the authorization (*i. e.*, the transferee takes the remaining portion of the fill-in period free from competing applications.) However, if the licensee transfers an authorization for any other CGSA in the RSA (granted after the first CGSA) or *less* than the total original CGSA authorization to another party, such party will have no right to expand the area covered by the transferred authorization unless the transferee obtains a statement signed by the transferor, its assignee or transferee agreeing to such an expansion.

FOOTNOTES

[1] The CGSA is the area within an RSA defined by an applicant as that which it intends to serve.

[2] The proposed service area is its CGSA. Amendment of the Commission's Rules for Rural Cellular Radio Service, CC Docket No. 85-388, 2 FCC Rcd 3366 (1987)(*Order on Reconsideration)* at para. 15. *Erratum*, 52 Fed. Reg. 29186 (1987).

[3] *Order on Reconsideration*, 2 FCC Rcd. at n. 18.

[4] Cellular Lottery Rule Making, 98 FCC 2d 175 (1984) (*Lottery Order).*

[5] *Id.* at n. 81. *But see Maxcell Telecom Plus, Inc. v. F. C. C.*, 815 F. 2d 1551 (D.C. Cir. 1987).

[6] Cellular Lottery Rule Making, 58 Rad. Reg. 2d (P&F) 677 (1985) (*Lottery Reconsideration Order)* at n. 43.

[7] *Id.* at 688.

[8] *Id.* at 688.

[9] *Second Report and Order*, 2 FCC Rcd at 2308.

[10] In this regard we note that if we change the height and power limitations applicable to cellular radio as we have proposed, Notice of Proposed Rule Making, Amendment of Parts 2 and 22 of the Commission's Rules to Permit Liberalization of Technology and Auxiliary Service Offerings in the Domestic Public Cellular Radio Telecommunications Service, CC Docket No. 87-390, 2 FCC Rcd 6244, 6246-47 (1987)(Cellular Notice), cellular licensees in the RSAs may be able to serve much larger areas from a cell site than they can under our existing rules. This could result in licensees re-designing their systems to serve larger areas. Such re-design efforts could take several years.

[11] *See* Cellular Notice, *supra*.

[12] We are currently considering in another proceeding the question of the degree to which profit is permissible in the sale of cellular authorizations for unbuilt systems, Bill Welch, FCC 88-182, released May 20, 1988, and will not accept comments on that issue here.

[13] Section 22.31(a)(1) of our Rules currently specifies that cellular applications will be considered mutually exclusive only if their proposed CGSAs overlap in such a way that grant of one would preclude the grant of another. We have waived this provision of the rules for purposes of the filing of RSA applications during the pendency of this proceeding. *See* Amendment of the Commission's Rules for Rural Cellular Service, CC Docket No. 85-388, FCC 88-156, released May 18, 1988, at para. 12.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-300

In re Applications of

ERNESTINE HILL (hereafter: Hill)	File No. BPH-870827NE
PRESTON LAWRENCE SALYER (hereafter: Salyer)	File No. BPH-870827NH
BETTER BROADCASTING, INC. (hereafter: BBI)	File No. BPH-870827NO
MIDSOUTH COMMUNICATIONS CORP. (hereafter: MidSouth)	File No. BPH-870827NX

For a Construction Permit
for a New FM Station
on Channel 259A
in Coeburn, Virginia

HEARING DESIGNATION ORDER

Adopted: June 10, 1988; Released: June 30, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *BBI.* Section II, Item 4 of FCC Form 301 (October 1986) requires that the applicant specify its address (number, street, city, state) as well as the home address of each of its principals. BBI has not completed Item 4 correctly. BBI's application gives a post office box number as the residence address for Charles G. Rakes and D. Lannis Yeary. Accordingly, BBI must submit an amendment which gives all the information required by Section II, Item 4 to the presiding Administrative Law Judge within 30 days of the release of this Order.

3. *Hill.* Applicant Hill has indicated that she is employed at stations WIFX/WIFX-FM, Jenkins, Kentucky. Hill has indicated that in the event she is successful herein, she would divest herself of her interest in the stations noted above. Accordingly, in the event of grant of Hill's application, Hill will be required to sever all connections with and divest herself of all interests in the noted stations prior to the commencement of program test authority.

4. *EEO.* In response to Section VI, FCC Form 301, Salyer and BBI have indicated that they will employ five or more fulltime employees. Pursuant to 47 C.F.R. § 73.2080(c), each applicant is required to submit an Equal Employment Opportunity (EEO) Program in compliance with the provisions of the rules as set forth in FCC Form 396A, the five-point Model EEO Program. The EEO programs submitted by Salyer and BBI are deficient in that they fail to identify at least one female-oriented recruitment source for Coeburn. Accordingly, Salyer and BBI will be required to file an amended EEO program with the presiding Administrative Law Judge within 30 days of the release of this Order.

5. *Areas and Populations.* Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

6. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

7. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in the light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

8. IT IS FURTHER ORDERED, That BBI shall submit an amendment which contains the information required by Section II, Item 4 of FCC Form 301, to the presiding Administrative Law Judge within 30 days of the release of this Order.

9. IT IS FURTHER ORDERED, That in the event of the grant of Hill's application, Hill will be required to sever all connection with and divest herself of all interest in radio stations WIFX and WIFX-FM, Jenkins, Kentucky, prior to commencement of program test authority.

10. IT IS FURTHER ORDERED, That Salyer and BBI shall file an amended EEO program with the presiding Administrative Law Judge within 30 days of the release of this Order.

11. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

12. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, not later than **July 21, 1988,** file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

13. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-302

In re Applications of

LARRY W. GAMBLE	File No. BPH-870825MA
Miguel V. Gutierrez d/b/a MADERA FM RADIO	File No. BPH-870827NL
MADERA FM LIMITED PARTNERSHIP (hereafter MFLP)	File No. BPH-870827NM
CYNTHIA K. BYINGTON	File No. BPH-870827NS

For Construction Permit
for a New FM Station
in Madera, California
Channel 297A (107.3 MHz)

HEARING DESIGNATION ORDER

Adopted: June 13, 1988; Released: June 30, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *MFLP*. MFLP specified in its application that it is a limited partnership consisting of a general partner, Manuel Jiminez, and a limited partner, Madera FM Association. Principals of the limited partner are involved with fifteen other applications for new FM facilities. However, MFLP failed to provide an insulation statement wholly satisfying the requirements of the Commission's *Attribution Reconsideration Order*, 58 RR 2d 604, 618 (1985).[1] In order to ensure its application's compliance with the Commission's multiple ownership rules and cross-interest policy, MFLP will be required to file an amendment with the presiding Administrative Law Judge within 30 days of the release of this Order.

3. Data submitted by the applicants indicate there would be significant difference in the size of the populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

4. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

5. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues.

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in the light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

6. IT IS FURTHER ORDERED, That MFLP shall submit to the presiding Administrative Law Judge an amendment to its application pursuant to paragraph 2 hereinabove, within 30 days of the release of this Order.

7. IT IS FURTHER ORDERED, That, in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

8. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, not later than **July 21, 1988,** file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

9. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTES

[1] In order for the limited partners to be exempt from attribution under the Commission's multiple ownership rules, 47 C.F.R. § 73.3555, the applicant must certify that, by the terms of the partnership agreement, its limited partners will refrain from involvement in any material respect in the management or operation of the proposed station and, further, that no limited partner has any interest or connection of any nature with any broadcast station or other medium of mass communication operating within the service area of the proposed station that is or might be inconsistent with the Commission's cross-interest policy under the *Attribution Reconsideration* Order, 58 RR 2d 604, 618 (1985).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-303

In re Applications of

P. SCOTT MILLER, MARVIN H. HALBERSTEIN AND DONALD E. RICE (hereafter MH&R)	File No. BPH-861215ME
NEWBERRY BROADCASTING CORPORATION (hereafter N.B.C.)	File No. BPH-861217MF
Roberta Roe Johnson d/b/a BAMA BROADCASTING COMPANY (hereafter Bama)	File No. BPH-861217MH
RIDDEN PARTNERSHIP (hereafter Ridden)	File No. BPH-861217MS
ROBERT J. ADAMSON (hereafter Adamson)	File No. BPH-861217MW
NEWBERRY BROADCAST PARTNERSHIP (hereafter NBP)	File No. BPH-861217ND
CLARENCE T. BARINOWSKI (hereafter Barinowski)	File No. BPH-861217NG

For a Construction Permit
for a New FM Station
on Channel 263A in
Newberry, Florida

HEARING DESIGNATION ORDER

Adopted: June 13, 1988; Released: June 30, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Adamson*. Adamson answered Section II, Item 10 of FCC Form 301 in the negative, but failed to provide a full explanation of his answer in an exhibit as required. Adamson will therefore be required to amend his application to provide a full explanation to the presiding Administrative Law Judge within 30 days of the release of this Order, or an appropriate issue will be specified by the Judge.

3. *Ridden*. Ridden states in Section V-B, Item 7 of FCC Form 301 that a directional antenna is not being proposed. However, a directional antenna pattern was submitted. This is not considered a tenderability or an acceptability defect because drawing on the application as a whole, we can confidently and reliably assume that a directional antenna is being proposed. Accordingly, Ridden will be required to submit an amendment to the presiding Administrative Law Judge within 30 days of the release of this Order amending Section V-B, Item 7 to indicate that a directional antenna is being proposed, or an appropriate issue will be specified by the Judge.

4. The applicants below have petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after October 22, 1986, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	AMENDMENTS FILED
MH&R	3/3/87 (engineering)
Ridden	2/17/88
Bama	12/11/87
NBP	2/24/87

5. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

6. Attempts to obtain Federal Aviation Administration (FAA) clearance through the Commission's Antenna Survey Branch and the applicants below have been unsuccessful. Accordingly, since no determination has been received as to whether the antennas proposed by the applicants below would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding. APPLICANTS: Adamson, Barinowski

7. Except as may by indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

8. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower height and location proposed by the following applicants would constitute a hazard to air navigation: Adamson, Barinowski

2. To determine, which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in the light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

9. IT IS FURTHER ORDERED, That Adamson will amend his application to provide a full explanation of his answer to Section II, Item 10 of FCC Form 301 to the presiding Administrative Law Judge within 30 days of the release of this Order, or an appropriate issue will be specified by the Judge.

10. IT IS FURTHER ORDERED, That Ridden will be required to submit an amendment to the presiding Administrative Law Judge within 30 days of the release of this Order to amend Section V-B, Item 7 of FCC Form 301, or an appropriate issue will be specified by the Judge.

11. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by the following applicants ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein: MH&R, Ridden, Bama, NBP

12. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

13. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

14. IT IS FURTHER ORDERED, That to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, not later than **July 21, 1988,** file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

15. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-304

In re Applications of

REBECCA L. BOEDKER (hereafter Boedker)	File No. BPH-870827ML
WILLIAM PHILLIP ZURICK (hereafter Zurick)	File No. BPH-870827MN
CHARLES W. LOUGHERY (hereafter Loughery)	File No. BPH-870827NI

For a Construction Permit for
a New FM Station on
Channel 297A (107.3 MHz)
in Northumberland, Pennsylvania

HEARING DESIGNATION ORDER

Adopted: June 13, 1988; Released: June 30, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Boedker and Loughery*. Boedker and Loughery propose to use the existing tower of FM stations WQSU, Selinsgrove, Pennsylvania, and WOEZ-FM, Milton, Pennsylvania. Both Boedker and Loughery list the overall tower height as being 61 meters (with obstruction lighting). However, review of the Commission's records for the above stations shows that the tower is actually 62 meters (including obstruction lighting). Because these applicants clearly propose to mount their antennas on an existing tower of other Commission licensees, and because specific reference is made to this tower in various places in the applications in question, the Commission can, "drawing on the applications as a whole," confidently verify the correct tower height of 62 meters by taking official notice of the tower height as found in the Commission's files for the licensed co-located facilities. Accordingly, Boedker and Loughery were found to be acceptable for filing; however, each applicant shall be required to file corrective amendments to their applications with the presiding Administrative Law Judge within 30 days of the release of this Order.

3. In response to Section VI, FCC Form 301, the applicant below has indicated that it will employ five or more full-time employees. Pursuant to 47 C.F.R. § 73.2080(c), each applicant is required to submit an Equal Employment Opportunity (EEO) Program in compliance with the provisions of the rules as set forth in FCC Form 396A, the five-point Model EEO Program. The EEO Program submitted by the following applicant is incomplete or is otherwise deficient in the manner described below. Accordingly, the applicant listed below will be required to file an amended EEO Program with the presiding Administrative Law Judge within 30 days of the release of this Order.

APPLICANT	DEFICIENCY
Boedker	Failed to specify the sources it proposes to use in recruiting minority employees.

4. The applicant below has petitioned for leave to amend its application on the dates shown. The accompanying amendments were filed after the last date for filing minor amendments as of right. Under 47 C.F.R. § 1.65, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANT	AMENDMENTS FILED
Boedker	April 18, 1988 (engineering); April 28, 1988

5. Data submitted by the applicants indicate there would be significant differences in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

6. Attempts to obtain Federal Aviation Administration (FAA) clearance through the Commission's Antenna Survey Branch and the applicant below have been unsuccessful. Accordingly, since no determination has been received as to whether the antenna proposed by Zurick would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

7. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

8. Accordingly, IT IS ORDERED, That pursuant to 47 U.S.C. § 309(e), the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower height and location proposed by the following applicant would constitute a hazard to air navigation: Zurick.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

9. IT IS FURTHER ORDERED, That Boedker and Loughery shall submit the amendments requested pursuant to paragraph 2 hereinabove to the presiding Administrative Law Judge within 30 days of the release of this Order.

10. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, the following applicant shall submit to the presiding Administrative Law Judge Section VI information in accordance with the requirement of 47 C.F.R. § 73.2080(c): Boedker.

11. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by the following applicant ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein: Boedker.

12. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

13. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

14. IT IS FURTHER ORDERED, That to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to 47 C.F.R. § 1.221(c), in person or by attorney, within 20 days of the mailing of this Order, not later than **July 21, 1988,** file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

15. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to 47 U.S.C. § 311(a)(2) and 47 C.F.R. § 73.3594, give notice of the hearing within the time and in the manner therein prescribed, and shall advise the Commission of the publication of such notice as required by 47 C.F.R. § 73.3594(g).

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-305

In re Applications of

SHIRLEY MARCHANT (hereafter Marchant)	File No. BPH-870429MD
James D. Hardy and Douglas M. Sutton, Jr. d/b/a RADIO SOUTH GEORGIA (hereafter RSG)	File No. BPH-870430ML
OMEGA FM LIMITED PARTNERSHIP (hereafter FM Limited)	File No. BPH-870430MN

For Construction Permit for a
New FM Station in Omega, Georgia,
Channel 298A (107.5 mHz)

HEARING DESIGNATION ORDER

Adopted: June 13, 1988; Released: June 30, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.[1]

2. *EEO.* In response to Section VI of FCC Form 301, Marchant and RSG indicated they will employ five or more fulltime emloyees. Therefore, each is required to submit the five-point Model Equal Employment Opportunity (EEO) Program (FCC Form 396A). The guidelines to the Model EEO Program, paragraph IV, instruct the applicant to specify the sources that it proposes to use in recruiting minority and female applicants. Marchant indicates that it will communicate with the Tifton NAACP but indicates that there are no women's groups in the area. RSG, conversely, provides three women's groups which it states it will communicate with but provides no minority organizations. Accordingly, Marchant will be required to amend its application by submitting specific sources of female recruitment sources and RSG will be required to submit specific sources of minority recruitment sources within 30 days of the release of this Order to the presiding Administrative Law Judge.

3. *Late - filed amendments.* The applicants below have petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	AMENDMENTS FILED
Marchant	September 25, 1987 (engineering)
RSG	March 16, 1988
	March 31, 1988

4. *Air Hazard Issue.* Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and the following applicant have been unsuccessful. Accordingly, since no determination has been received as to whether the antenna proposed by FM Limited would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

5. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

6. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

7. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower height and location proposed by the following applicant would constitute a hazard to air navigation: FM Limited

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in the light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

8. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, the following applicant shall submit Section VI information in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge: Marchant

9. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by the following applicants ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein: Marchant, RSG

10. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

11. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

12. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, not later then **July 21, 1988,** file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

13. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTE

[1] The application of Steve McGowan (BPH-870430MP) was returned on January 26, 1988, and no petition for reconsideration has been filed.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 86-125
Phase II

In the Matter of

Annual 1985 Access Tariff Filings

ORDER

Adopted: June 16, 1988; Released: June 29, 1988

By the Chief, Common Carrier Bureau:

1. On March 9, 1987, the Commission released an Order requiring local exchange carriers (LECs) to refund unlawful Minimum Monthly Usage Charges (MMUCs) and presubscription change charges. Annual 1985 Access Tariff Filings, CC Docket No. 86-125, Phase II, 2 FCC Rcd 1416 (1987) (*Terms and Conditions Order*). [1] The date set for refunds was July 7, 1987.

2. On April 8, 1987, MCI Telecommunications Corporation (MCI) filed a petition for clarification or, in the alternative, partial reconsideration of that Order.[2] On April 9, 1987, the GTE Service Corporation (GTE) filed a petition for partial reconsideration, and on June 5, 1987, New York Telephone Company and New England Telephone and Telegraph Company (NYNEX) filed a petition for reconsideration of the *Terms and Conditions Order*. Responsive pleadings have been filed by several parties.

3. On June 26, 1987, the Bell Atlantic Telephone Companies (Bell Atlantic) filed a request for stay of the MMUC refund requirement. In view of these pleadings, the Bureau granted all LECs an extension of time until March 31, 1988, to make refunds of unlawful MMUCs and presubscription change charges in compliance with the *Terms and Conditions Order*. Annual 1985 Access Tariff Filings, CC Docket No. 86-125, Phase II, 2 FCC Rcd 7534 (1987). On March 28, 1988, the Bureau extended the effective date of the refunds until June 30, 1988. Annual 1985 Access Tariff Filings, CC Docket No. 86-125, Phase II, 3 FCC Rcd 1973 (1988).

4. By this Order, we find that additional time is necessary for consideration of arguments raised in the request for stay, the petitions, and the responsive pleadings. Therefore, we hereby grant all local exchange carriers a further extension of time until not later than September 30, 1988, to refund MMUCs and presubscription change charges found unlawful in the *Terms and Conditions Order*. Carriers are advised that the Commission retains its discretion to require payment of interest on any refund amounts.

5. Accordingly, IT IS ORDERED that all local exchange carriers ARE GRANTED an extension of time until not later than **September 30, 1988,** to make refunds of Minimum Monthly Usage Charges and presubscription change charges as required by the *Terms and Conditions Order*.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

UNITED STATES GOVERNMENT
MEMORANDUM

Date: June 16, 1988

To: Jerry Brock
Carl Lawson
Colleen Boothby
Melanie Haratunian

Reply to Attention of: Jane Hinckley

Tariff Division

Through: John Cimko

Subject: Annual 1985 Access Tariff Filings, CC Docket No. 86-125, Phase II (MMUC and Presubscription Change Charge Refunds)

[NO FRONT OFFICE MEETING SCHEDULED]
[REFUNDS TO TAKE EFFECT JUNE 30, 1988]

On March 28, 1988, the Bureau extended the Minimum Monthly Usage Charge (MMUC) and presubscription change charge refund liability of local exchange carriers until June 30, 1988. Annual 1985 Access Tariff Filings, CC Docket No. 86-125, Phase II, 3 FCC Rcd 1973 (1988). We find it necessary to again defer consideration of this matter, and recommend that local exchange carriers be given until September 30, 1988, to effect MMUC and presubscription change charge refunds. We are now working on the General Counsel's requested revisions to the Order in this proceeding.

FOOTNOTES

[1] For a summary of the Terms and Conditions Order, see 52 Fed Reg. 16,388 (1987).

[2] On April 22, 1987, a public notice was issued to clarify that filing dates for petitions relating to reconsideration of the Terms and Conditions Order would be calculated from the date of the Federal Register summary. Commission Sets Pleading Cycle For Responses To Petitions for Clarification and Reconsideration of 1985 Annual Access Tariff Terms and Conditions Order, Public Notice, released Apr. 22, 1987. As a result of this public notice, MCI voluntarily refiled its petition on June 4, 1987.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

RKO GENERAL, INC. (KRTH)
Los Angeles, California
MM DOCKET NO. 84-1184
File No. BR-22

For Renewal of License

FUTURE BROADCASTING, INC.
Los Angeles, California
MM DOCKET NO. 84-1186
File No. BP-800924AC

VALLEY RADIO 670
Los Angeles, California
MM DOCKET NO. 84-1187
File No. BP-830506AD

SOUTH JERSEY RADIO, INC.
Hawthorne, California
MM DOCKET NO. 84-1188
File No. BP-830511AE

COZZIN COMMUNICATIONS CORPORATION
Beverly Hills, California
MM DOCKET NO. 84-1190
File No. BP-830512AY

For Construction Permit for a New AM Station

RKO GENERAL, INC. (KRTH-FM)
Los Angeles, California
MM DOCKET NO. 84-1195
File No. BRH-25

For Renewal of License

MARISOL BROADCASTING, LTD.,
A Limited Partnership
Los Angeles, California
MM DOCKET NO. 84-1196
File No. BPH-830512CZ

RADIO RADIO, INC.
Los Angeles, California
MM DOCKET NO. 84-1198
File No. BPH-830512BE

SOUTH JERSEY RADIO, INC.
Los Angeles, California
MM DOCKET NO. 84-1199
File No. BPH-830512BZ

COZZIN COMMUNICATIONS CORP.
Los Angeles, California
MM DOCKET NO. 84-1201
File No. BPH-830512BC

VALLEY RADIO 670
Los Angeles, California
MM DOCKET NO. 84-1203
File No. BPH-830506AG

FUTURE BROADCASTING, INC.
Los Angeles, California
MM DOCKET NO. 84-1207
File No. BPH-800924AA

For Construction Permit for a New FM Station

ERRATA

Released: June 30, 1988

Reproduction errors in *Partial Initial Decision* FCC 88D-11, released April 20, 1988, ARE CORRECTED as follows:

Para. 1, line 10 - the word "and" should precede the word "Valley" so that the name "Valley Radio" appears, and the name "Future" should appear immediately after "Valley Radio."

Para. 13, line 7 - period after word "treasurer."

Para. 40, line 4 - comma after "87D-20,."

Para. 45, line 3 - no hyphen in word "newspaper."

Para. 58, line 26 - only one word "of" should appear.

Para. 75 - Para. "76" should begin after "1981" on twelfth line and insert right side parenthesis after "(Id."

Para. 85 - third word in line eight should be spelled "strengthen."

Para. 86 - last word on first line begins with lower case s in word "since."

Para. 98 - second word of last line of quote should be "became."

Para. 118 - Line 8, delete typo "ald.)" and insert omitted language "and from 42.85% to 18%, respectively. (Id.)"

Para. 125 - Fifth word of first line is "active."

Para. 126 - Line 18 should read "Ms. Brimberry."

Para. 146 - Line 2, inverted "sit" should be "tis" in word "Advertising.

Para. 163 - Line 6, "amoung" should be correctly spelled as word "amount."

Para. 164 - Sub-heading above Para. 164 should be italicized.

Para. 180 - Line 39, word "frequency" should be "freeway," Line 54, word "Lakes" should be spelled correctly as "Locks."

Para. 194 - Line 12, insert after word "said" the language "that he had reliable funding sources."

Para. 205 - Line 5, delete word "that."

Para. 226 - Line 17, word "of" should be "if."

Para. 230 - Line 4, word "them" should be "then."

Para. 237 - Line 2, phrase "or 20%" should be "of 20%."

SO ORDERED.

FEDERAL COMMUNICATIONS COMMISSION

Richard L. Sippel
Administrative Law Judge

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

FEDERAL EXPRESS CORPORATION,
Complainant,

v. File No. E-87-45

AMERICAN TELEPHONE AND
TELEGRAPH COMPANY,
Defendant.

ORDER

Adopted: June 22, 1988; Released: July 1, 1988

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

1. We have before us a joint motion filed on June 1, 1988, by Federal Express Corporation (Federal) and American Telephone and Telegraph Company (AT&T), requesting that we dismiss with prejudice the above-referenced proceeding and authorize the parties' agreement to settle all issues raised in the matter. For the reasons set forth below the joint motion is granted.

2. This proceeding was initiated by a formal complaint filed by Federal against AT&T on March 13, 1987, alleging that AT&T's rates for 56 kilobits per second (kbps) Dataphone Digital Service (DDS) were unjust and unreasonable within the meaning of Section 201(b) of the Communications Act, 47 U.S.C. § 201(b). AT&T denied such allegations and moved to dismiss the complaint. On April 13, 1988, the Common Carrier Bureau (Bureau) released an order in the proceeding in which it granted AT&T's motion to dismiss in part and denied it in part. *Aetna Life Insurance Company et al. v. AT&T*, DA-88-462 (released April 13, 1988). On May 13, 1988, Federal filed an Application for Review of the Bureau's order. Subsequently, the parties entered into settlement negotiations with the cooperation of the Enforcement Division. As a result of these negotiations, the parties reached a settlement that resolves all matters in controversy.[1]

3. Federal and AT&T represent that their agreement resolves all claims alleged in the complaint in a manner acceptable to both parties. The parties state that grant of their joint motion will terminate the proceeding in a manner satisfactory to both, and conserve the time and resources of the parties and the Commission.

4. On the basis of the statements contained in the parties' motion, we conclude that there are no longer issues in controversy and the proceeding should be terminated.

5. Accordingly, IT IS ORDERED, pursuant to authority delegated in Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the "Joint Motion to Authorize Settlement and Dismiss Complaint" filed by Federal Express Corporation and American Telephone and Telegraph Company IS GRANTED.

6. IT IS FURTHER ORDERED that the "Settlement Agreement" between Federal Express Corporation and American Telephone and Telegraph Company IS AUTHORIZED.

7. IT IS FURTHER ORDERED that the above-captioned complaint IS DISMISSED WITH PREJUDICE.

FEDERAL COMMUNICATIONS COMMISSION

Howard M. Wilchins
Deputy Chief, Enforcement Division
Common Carrier Bureau

FOOTNOTE

[1] By separate letter dated June 1, 1988, Federal represents that it will request the Commission to dismiss its application for review once the Joint Motion to Authorize Settlement and Dismiss Complaint has been granted.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

SCHNEIDER COMMUNICATIONS, INC. File No. I-T-C-88-110

Application for authority to operate as an international resale carrier

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: June 22, 1988; Released: July 1, 1988

By the Chief, International Facilities Division:

1. On April 15, 1988, Schneider Communications, Inc. (SCI) filed an application requesting authority, pursuant to Section 214 of the Communications Act of 1934, as amended, to resell the switched message telephone services of existing carriers to provide international switched voice service between the U.S. and various overseas points. The application was placed on public notice on April 27, 1988. No comments were received.

2. SCI, a Wisconsin corporation, is already providing domestic resale services. It now proposes to resell international switched voice service in competition with other carriers already providing resale of such service. In recent authorizations of new entrants, the Commission has recognized that increased competition in international markets is beneficial.[1] We find that the market will support additional carriers and that the added competition will be in the public interest.[2]

3. For the foregoing reasons, IT IS CERTIFIED that the present and future convenience and necessity require the provision of international switched voice services to the general public by SCI.

4. Accordingly, IT IS ORDERED that application File No. I-T-C-88-110 IS GRANTED and SCI is authorized to provide international switched voice services by the resale of the international switched voice services set forth in AT&T's Tariff FCC No. 1, between the U.S. and those points listed in that tariff.

5. Copies of any operating agreements entered into between SCI and its correspondents shall be filed with the Commission within 30 days of their execution.

6. IT IS FURTHER ORDERED that SCI shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203 and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this order.

7. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *See* the cases cited in Teltec Saving Communications Co., Mimeo No. 3548, (released April 4, 1986) at n. 2.

[2] FCC v. RCA Communications, Inc., 346 U.S. 86 (1953); Mackay Radio and Telegraph Co., 28 FCC 231 (1960).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE AND TELEGRAPH COMPANY — File No. I-T-C-88-112

Application for authority to acquire and operate facilities for service to Israel and beyond

ORDER AND AUTHORIZATION

Adopted: June 22, 1988; Released: July 1, 1988

By the Chief, International Facilities Division:

1. The captioned uncontested application, filed on April 15, 1988 by American Telephone and Telegraph Company (AT&T), requests authority to acquire, install and operate additional circuit multiplication equipment to establish up to 90 additional circuits for the provision of AT&T's authorized services between the U.S. and Israel and beyond. The application was placed on public notice on April 27, 1988. No comments were received. Upon consideration of the application, we find that authorization of the requested facilities and services is required by the public convenience and necessity.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-88-112 IS GRANTED, and AT&T is authorized to:

a. acquire and install three Digital Trunk Expander terminals; and

b. operate these facilities, in conjunction with similar terminals installed by AT&T's correspondent in Israel, to provide AT&T's regularly authorized services between the U.S. and Israel and beyond.

3. This order is issued under Section 0.291 of the Commission's rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

BUSINESS TELECOM, INC. — File No. I-T-C-88-120

Application for authority to operate as an international resale carrier

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: June 22, 1988; Released: July 1, 1988

By the Chief, International Facilities Division:

1. On April 22, 1988, Business Telecom, Inc. (BTI) filed an application requesting authority, pursuant to Section 214 of the Communications Act of 1934, as amended, to resell the switched message telephone services of existing carriers to provide international switched voice service between the U.S. and various overseas points. The application was placed on public notice on May 4, 1988. No comments were received.

2. BTI, a North Carolina corporation, is already providing domestic resale services. It now proposes to resell international switched voice services in competition with other carriers already providing resale of such service. In recent authorizations of new entrants, the Commission has recognized that increased competition in international markets is beneficial.[1] We find that the market will support additional carriers and that the added competition will be in the public interest.[2]

3. For the foregoing reasons, IT IS CERTIFIED that the present and future convenience and necessity require the provision of international switched voice services to the general public by BTI.

4. Accordingly, IT IS ORDERED that application File No. I-T-C-88-120 IS GRANTED and BTI is authorized to provide international switched voice services by the resale of the international switched voice services set forth in AT&T's Tariffs FCC Nos. 1 and 2, MCI Telecommunications Corp.'s Tariff FCC No. 1, and US Sprint's Tariffs FCC Nos. 1 and 2, between the U.S., on the one hand, and Canada and Mexico and those points listed in those tariffs on the other hand.

5. Copies of any operating agreements entered into between BTI and its correspondents shall be filed with the Commission within 30 days of their execution.

6. IT IS FURTHER ORDERED that BTI shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203 and Part 61 of the Commission's rules, 47 C.F.R. Part 61, for the services authorized in this order.

7. This order is issued under Section 0.291 of the Commission's rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *See* the cases cited in Teltec Saving Communications Co., Mimeo No. 3548, (released April 4, 1986) at n. 2.

[2] FCC v. RCA Communications, Inc., 346 U.S. 86 (1953); Mackay Radio and Telegraph Co., 28 FCC 231 (1960).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MARINE	File No. I-T-D-88-006
TELEPHONE	File No. I-T-D-88-007
COMPANY	

Application for authority to close VHF-FM Public Local Coast Station, WHU 746, Norfolk, Virginia

Application for authority to close VHF-FM Public Local Coast Station WHU 734, Baltimore, Maryland

ORDER AND AUTHORIZATION

Adopted: June 22, 1988; Released: July 1, 1988

By the Chief, International Facilities Division:

1. On May 3, 1988, Marine Telephone Company (MTC) filed the above-captioned applications, requesting authority, pursuant to Section 214 of the Communications Act of 1934, as amended, to discontinue service from VHF-FM Public Local Coast Stations WHU 746, Norfolk, Virginia and WHU 734, Baltimore, Maryland. Station WHU 746 primarily serves the Norfolk, Virginia area, a large metropolitan area, bordered on the north by the southern bank of the Chesapeake Bay and on the west by the Willoughby, Lafayette and Elizabeth Bays which feed into the James River. Station WHU 734 primarily serves the Baltimore, Maryland area, a large metropolitan area, located on the northeast bank of the Chesapeake Bay, 10-15 miles east of the Intracoastal Waterway. The traffic at both stations comes from pleasure craft and commercial vessels traveling in the area. The applications were placed on Public Notice on May 11, 1988. No comments were received.

2. The basic statutory test to be applied by the Commission in considering applications for discontinuance of common carrier service to a community is found in Section 214(a) of the Act. Under this Section, the Commission may permit discontinuance of service upon a finding that "neither the present nor future public convenience and necessity will be adversely affected by the proposed action. Application of this standard presents the Commission with the task of balancing the financial burden that would be imposed on the carrier by continued operation of its facilities with the needs and interests of the user community.[1]

3. In support of its application to close station WHU 746, MTC states that the station has been handling a total of no more than two calls per month for the past 18 months. The minimal demand has caused an annual loss in excess of11,000. Competing service is provided by the C&P Telephone Company, K1C 631, and Coastal Marine Telephone Company, WHV 240. Emergency/distress service is provided by the US Coast Guard and weather service is provided by the National Oceanic and Atmospheric Administration (NOAA).

4. In support of its application to close station WHU 734, MTC states that the station has been handling a total of no more than two calls per month for the past 18 months. The minimal demand has caused an annual loss in excess of11,000. Competing service is provided by C&P Telephone Company, KGD 518, and Radio Communications, Inc., KSK 209. Emergency/distress service is provided by the U.S. Coast Guard and weather service is provided by NOAA.

5. Upon consideration of the applications and in view of the foregoing, IT IS HEREBY CERTIFIED that neither the present nor future public convenience and necessity will be adversely affected by the discontinuance of service via the instant stations.

6. Accordingly, IT IS ORDERED that applications File Nos. I-T-D-88-006 and I-T-D-88-007 ARE GRANTED, and MTC is authorized to discontinue service via VHF-FM, Public Local Coast Stations WHU 746, Norfolk, Virginia and WHU 734, Baltimore, Maryland.

7. This order is issued under Section 0.291 of the Commission's rules is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTE

[1] Public Coast Radiotelegraph Stations, 67 FCC 2d 791, at 795 (1978).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

COMSAT GENERAL CORPORATION File No. 1228-DSS-AL-88

and

MCI TELECOMMUNICATIONS CORPORATION

Application for Consent to Assignment of License and Relocation of the SBS-2 Domestic Fixed-Satellite

MEMORANDUM OPINION AND ORDER

Adopted: June 22, 1988; Released: July 1, 1988

By the Chief, Common Carrier Bureau:

1. COMSAT General Corporation (COMGEN) and MCI Telecommunications Corporation (MCI) request Commission consent to assign the license for the SBS-2 domestic fixed-satellite from MCI to COMGEN. COMGEN also requests that SBS-2 be co-located with its SBS-1 domestic fixed-satellite, which is temporarily located at 99' W.L. and which has been reassigned, at COMGEN's request, to 75' W.L.[1] For the reasons discussed below, the application is granted.

I. BACKGROUND AND PLEADINGS

2. COMGEN has entered into an agreement with MCI and its subsidiary, Satellite Business Systems (SBS), to acquire two in-orbit 12/14 GHz satellites, SBS-1 and SBS-2. The Commission has approved the assignment of SBS-1 to COMGEN.[2] It also has authorized COMGEN to operate SBS-1 temporarily at 99' W.L. until that location is scheduled to be occupied by another domestic satellite, and it has reassigned SBS-1 to 75' W.L. [3]

3. Under its contract with MCI-SBS, COMGEN agreed to lease various types and amounts of transponder capacity from SBS for specified periods of time and MCI-SBS agreed to transfer ownership of the satellites to COMGEN at the expiration of the lease periods. The agreement also requires COMGEN to maintain SBS-2 at its current orbital location of 97' W.L. through July 1988 in order to satisfy potential leaseback arrangements to MCI-SBS.

4. The SBS-2 satellite was launched in October 1981 and is nearing the end of its nominal useful life. COMGEN claims, however, that co-located operation of SBS-1 and SBS-2 would allow it to provide 12/14 GHz band service quickly and inexpensively to meet market demand for satellite transmission capacity.[4] Further, COMGEN argues that temporary co-location of the satellites at 99' W.L., rather than immediate relocation to 75' W.L., would conserve fuel that could be used to extend the satellites' operational lifetimes and also would avoid imposing unnecessary costs on customers.

5. Public notice of the application was given, and comments were filed by GTE Spacenet Corporation (GTE) and Contel ASC. Both parties expressed concern that the co-located SBS-1 and SBS-2 satellites relinquish the 99' W.L. orbital location when it is needed for use by another satellite. In reply, COMGEN reaffirmed its intention to relocate both satellites to 75' W.L. when the 99' W.L. location is needed for another satellite's operation.

II. DISCUSSION

6. The Commission has a statutory obligation to determine whether granting an application to transfer or to assign an authorization will serve the public interest, convenience and necessity. 47 U.S.C. § 310 (d). As an initial matter, we note that COMGEN's qualifications to be a licensee are a matter of record with the Commission. In addition, grant of this application will provide an opportunity for the public to continue receiving services from SBS-2. Thus, we find that the assignment of SBS-2 to COMGEN is in the public interest.

7. We also find that co-locating SBS-2 with SBS-1 would serve the public interest. SBS-1 has already been reassigned to 75' W.L. and is currently temporarily located at 99' W.L. Co-locating these satellites, which are nearing the end of their nominal useful lives, represents efficient utilization of the orbit and spectrum resources and will not adversely affect other domestic satellite carriers. Further, the temporary co-location of these satellites at 99' W.L. will be expressly conditioned so that the Commission's processing of pending domestic fixed-satellite applications also will not be adversely affected. SBS-2 can be operated temporarily at 99' W.L. until another authorized satellite is ready to occupy that location, and it will be reassigned to 75' W.L. for the remainder of its license term.[5]

III. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED that, pursuant to Section 0.291 of the Commission's rules on delegation of authority, 47 C.F.R. § 0.291, COMGEN and MCI's application (File No. 1228-DSS-AL-88) for consent to assign the radio license for the SBS-2 satellite IS HEREBY GRANTED.

9. IT IS FURTHER ORDERED that COMGEN IS GRANTED authority to operate the SBS-2 satellite temporarily at 99' W.L., effective within 30 days of the release of this Order and subject to consummation of the assignment transaction. COMGEN shall cease all operations (except telemetry, tracking and command) of the SBS-2 satellite at 99' W.L. and shall begin to relocate it to its assigned orbit location, consistent with the terms of this Order, no later than the date on which another domestic satellite assigned to the 99' W.L. orbital location is ready to occupy that location.

10. IT IS FURTHER ORDERED that *Assignment of Orbital Locations*, 50 Fed. Reg. 35228 (August 30, 1985), IS MODIFIED to reassign the SBS-2 satellite from 97' W.L. to 75' W.L., effective within 30 days of the release of this Order and subject to consummation of the assignment transaction.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] COMGEN has also requested that we modify the SBS-2 license to permit its operation using the "COMSAT Manuever." *See* File No. 1229-DSS-ML-88. With this technique, COMGEN would cease north-south stationkeeping of the satellite, thereby conserving fuel and extending the spacecraft's operational lifetime. We will act on this request in a separate proceeding.

[2] COMSAT General Corporation, 2 FCC Rcd 4570 (1987).

[3] *Id.*

[4] In 1985 COMGEN was granted authority to construct, launch and operate three state-of-the-art 12/14 GHz satellites. *See* COMSAT General Corporation, 103 FCC 2d 621 (1985). It has since relinquished those authorizations. *See* Letter of President, COMGEN to Secretary, FCC (September 14, 1987).

[5] After the license term expires, COMGEN may request special temporary authority to continue operating SBS-2 if it demonstrates that the satellite is capable of providing additional service to the public. Extended operation of SBS-1 beyond its license term will be treated in the same manner. *See* COMSAT General Corporation, 2 FCC Rcd 4570, 4571 (1987).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-269

In re Application of

ST. CROIX WIRELESS CO.,
A Limited Partnership

File No. BPH-850711QD

For Construction Permit for
a New FM Station at
Christiansted, Virgin Islands

MEMORANDUM OPINION AND ORDER

Adopted: June 20, 1988; Released: July 1, 1988

By the Commission:

BACKGROUND

1. The designation order in this proceeding directed each of the parties to file written notices of appearance by August 19, 1987. *St. Croix Wireless Co.*, 2 FCC Rcd 4447, 4448 ¶ 14 (Mass Med. Bur. 1987). On August 19, the parties filed a joint request for approval of settlement agreements that would terminate the proceeding. St. Croix Wireless entered into separate settlement agreements with Sugarbird Communications and two other mutually exclusive applicants. Each of the parties, except Sugarbird Communications, filed notices of appearance. During the week of August 31, 1987, the ALJ called Sugarbird's counsel and advised him to file the notice of appearance. When Sugarbird failed to file a notice of appearance by September 4, 1987, the ALJ dismissed its application for failure to prosecute. *St. Croix Wireless Co.*, FCC 87M-2123 (Admin. L.J. Sept. 8, 1987). The ALJ also granted the joint request, approved the settlement, and terminated the proceeding. *St. Croix Wireless Co.*, 87M-2124 (Admin. L.J. Sept. 8, 1987). Sugarbird filed a petition for reconsideration. On September 17, 1987, the ALJ denied reconsideration, asserting that his authority over the proceeding ended when he terminated the proceeding. *St. Croix Wireless Co.*, 87M-2237 (Admin. L.J. Sept. 17, 1987).

2. On January 26, 1988, or almost five months after the dismissal of Sugarbird's petition, Sugarbird filed an appeal of the ALJ's actions with the Review Board. Sugarbird had never been served with the ALJ's September 17 order denying reconsideration because its name had been removed from the Commission's service mailing list after Sugarbird's application had been dismissed for failure to prosecute. Sugarbird argued that its pleading should have been considered timely because it was not served with the ALJ's order and it did not have notice of the ALJ's action until January 6, 1988, when its counsel inquired about its petition for reconsideration and it obtained a copy of the ALJ's order from the Commission. The Board rejected Sugarbird's request for leave to file an untimely pleading because Sugarbird: (1) failed to file a timely notice of appearance; (2) filed an unauthorized petition for reconsideration with the ALJ; (3) failed to file a timely appeal with the Review Board; and (4) mistitled the pleading filed with the Review Board as an application for review. *St. Croix Wireless Co.*, 3 FCC Rcd 1046, 1047 ¶ 6 (Rev. Bd. 1988).

3. On March 16, 1988, the Mass Media Bureau issued a construction permit for Christiansted to St. Croix Wireless. Now before the Commission are an Application for Review and a Request for Review on Motion of the Commission and Stay, both filed April 1, 1988, by Sugarbird. Also under consideration is a settlement agreement filed August 19, 1987 by Sugarbird and by St. Croix Wireless. Sugarbird argues that the ALJ's dismissal of its application was unfair because it was unaware of any specific deadline for the filing of a notice of appearance. It asserts that the dismissal of its application is inconsistent with the treatment accorded similarly situated applicants. In *Mexico Beach FM Group Limited*, FCC 87M-1488 (Admin. L.J. June 30, 1987), a late-filed notice of appearance was accepted by the ALJ after all of the parties entered into an agreement to settle and terminate the proceeding. Sugarbird also argues that the Board erred in rejecting its appeal as untimely because its name was removed from the Commission's service list and it was unaware of the ALJ's denial of reconsideration until it inquired and obtained a copy of the ALJ's order from the Commission on January 6, 1988. Sugarbird argues that its application should be reinstated and that the Commission should approve the settlement agreement.

DISCUSSION

4. *The Dismissal of Sugarbird's Application* : We will grant Sugarbird's application for review and reinstate its application. First, however, we reject Sugarbird's argument that it would be unfair to dismiss its application simply because it was unaware of any deadline for filing of a notice of appearance. The Commission's rules provide that:

> the applicant . . . shall, within 20 days of the mailing of the notice of designation for hearing by the Secretary, file with the Commission . . . a written appearance stating that he will appear on the date fixed for hearing and present evidence on the issues specified in the order. Where an applicant fails to file such a written appearance within the time specified . . . the application will be dismissed with prejudice for failure to prosecute.

47 C.F.R. § 1.221(c). The hearing designation order gave Sugarbird notice that it would have to file a notice of appearance by August 19, 1987. The ALJ even called applicant's counsel and personally advised him to file the notice of appearance. Thus, Sugarbird had more than adequate notice that the failure to file a notice of appearance could be fatal.

5. We believe, however, that under the circumstances of this case, the dismissal was unduly harsh, and that the ALJ should have accepted a late-filed notice of appearance. Sugarbird indicated its intent to fully participate in this proceeding by its involvement in the settlement agreement. The settlement agreement advised the ALJ and the

parties of the name and address of Sugarbird's attorney and placed them on notice that it would participate. Moreover, in at least one similar instance, an ALJ accepted a late-filed notice of appearance when all of the parties entered into a settlement agreement. *Mexico Beach FM Group Limited Partnership*, FCC 87M-1488 (Admin. L.J. June 30, 1987).

6. In the *Report and Order In Re : Establishment of a Fee Collection Program*, 2 FCC Rcd 947, 985 n.135 (1987), the Commission determined that, where applicants file a settlement agreement by the date for filing notices of appearance, the6,000 hearing fee would not have to be paid. The *Report and Order*, 2 FCC Rcd at 985 n.136, further makes clear that ALJs have discretion, based on a showing of good cause, to accept late-filed notices of appearance when a hearing fee has been submitted. Thus, although the *Report and Order* provides that a notice of appearance is still required, we can understand that Sugarbird's counsel may have had some confusion about the urgency for filing a notice. Even after the call from the ALJ, Sugarbird's counsel was unaware of a specific filing date for the notice of appearance. Under these circumstances – where the parties have entered into a universal settlement, the proceeding is being terminated, and there will be no prejudice to other parties or the public – it is appropriate that leniency attach to the requirement for filing the notice of appearance, and settlement agreements can be approved contingent on the filing of the required notice.

7. We also reject the Board's reliance on the facts that Sugarbird failed to timely file its appeal, and that it misnamed the appeal by calling it an application for review. When the ALJ dismissed Sugarbird's application its name was deleted from the service list. When it petitioned for reconsideration its name should have been restored to the service list, so that it would be served with all Commission orders pertinent to this proceeding. Sugarbird's name was inadvertently not restored, and it did not receive timely notice of the ALJ's September 17 order. Sugarbird eventually inquired about the reconsideration and ascertained that the ALJ had ruled on it. It obtained a copy of the ALJ's order on January 6, 1988 and filed its appeal on January 26, 1988. Where the Commission failed to adhere to the usual service procedures, we cannot fault Sugarbird for failing to appeal the September 17 order in a more timely fashion. Thus, Sugarbird's appeal should have been accepted by the Board. Moreover, although the misidentification of Sugarbird's pleading may be some evidence of ineptitude, under the circumstances of this proceeding, the Board has elevated form over substance, and this deficiency falls short of justifying the Board's refusal to consider Sugarbird's appeal.

8. *The Settlement Agreement* : Sugarbird's settlement agreement complies with 47 U.S.C. § 311(c) and 47 C.F.R. § 73.3525, which govern settlement agreements. Attached to the settlement agreement are affidavits from Catherine Thomas, general partner of Sugarbird, and Betsy A. Lopez, general partner of St. Croix Wireless, certifying that the Sugarbird and St. Croix Wireless applications were not filed for the purpose of reaching or carrying out a settlement agreement. Approval of the agreement will serve the public interest because the inclusion of Sugarbird in the settlement and the dismissal of Sugarbird's application will terminate the proceeding, conserve the resources of the Commission and the parties, and facilitate the institution of a new FM station at Christiansted, Virgin Islands.

9. *The Stay Request* : Sugarbird requests that the Commission stay the effective date of the construction permit issued to St. Croix Wireless until the Commission rules on its application for review. There is no reason to penalize listeners and advertisers in the Virgin Islands for Sugarbird's inattention to the Commission's rules. This proceeding was previously terminated by settlement. We are approving the agreement between Sugarbird and St. Croix Wireless, and we will dismiss Sugarbird's application and terminate the proceeding. Thus, the requested stay is not required to protect Sugarbird's interest in this proceeding and would needlessly delay the institution of a new FM service at Christiansted, Virgin Islands, and it is dismissed as moot.

ORDERS

10. ACCORDINGLY, IT IS ORDERED, That the Application for Review filed April 1, 1988 by Sugarbird Communications IS GRANTED.

11. IT IS FURTHER ORDERED, That the proceeding in Docket No. 87-141 IS REOPENED, and the application filed by Sugarbird Communications (File No. BPH-850712DD) IS REINSTATED for the limited purpose of including Sugarbird Communications in the settlement of this proceeding.

12. IT IS FURTHER ORDERED, That the Settlement Agreement contained in the Joint Petition for Approval of Settlement Agreements filed August 19, 1987 between Sugarbird Communication and St. Croix Wireless Co. IS APPROVED.

13. IT IS FURTHER ORDERED, That the Request for Review on Motion of the Commission and Stay filed April 1, 1988 by Sugarbird Communications IS DISMISSED as moot.

14. IT IS FURTHER ORDERED, That the application filed by Sugarbird Communication (File No. BPH-850712DD) IS DISMISSED and that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Southwestern Bell Telephone
Company's Petition for Waiver
of Part 69
of the Commission's Rules

ORDER

Adopted: June 22, 1988; Released: June 30, 1988

By the Chief, Common Carrier Bureau

I. INTRODUCTION

1. On January 22, 1988, Southwestern Bell filed a petition for waiver of Section 69.5 of the Commission's Rules[1] with respect to interstate traffic switched from a private network to the local exchange via Centrex-ETS service. On February 8, 1988, the Commission released a public notice requesting comments on the petition.[2] In this order we find that Southwestern Bell has failed to demonstrate particular facts and circumstances that would warrant a waiver. Rather, as the comments demonstrate, Southwestern Bell is in the same position as other local exchange carriers (LECs) that provide Centrex-ETS services. Accordingly, the petition of Southwestern Bell is denied.

II. BACKGROUND

2. On December 18, 1987, the Commission released a Memorandum Opinion and Order in response to the Bell Atlantic Petition for Declaratory Ruling Concerning Application of the Commission's Access Charge Rules to Private Telecommunications Systems. [3] The Bell Atlantic petition was prompted by a ruling of the AT&T divestiture court[4] that US West was violating its nondiscrimination obligations under the Modified Final Judgment (MFJ)[5] in its provision of Centrex-ETS services for the Federal Telecommunications System (FTS) network. AT&T filed a motion with the MFJ court, complaining that US West was applying Feature Group A (FGA) rates to off-network[6] calls completed through the Common Controlled Switching Arrangement (CCSA)[7] services that AT&T provides for the FTS network, while US West was charging the General Services Administration (GSA) cheaper, flat, local business rates when it used Centrex-ETS services[8] to complete off-network calls. The MFJ Court granted AT&T's motion, ruling that the switching services being offered by US West and AT&T were identical and that the MFJ requires the BOCs to provide exchange access to GSA at the same rates regardless of whether GSA selects a BOC or an interexchange carrier (IXC) to provide the switching services.

3. Subsequently, Bell Atlantic filed a petition requesting the Commission to clarify whether under Part 69, Bell Atlantic might require its customers to pay FGA charges for off-network calls which are completed through Centrex/Electronic Tandem Node. In the order responding to Bell Atlantic's petition, the Commission concluded that Centrex-ETS service should be treated like CCSA service for purposes of the access charge rules.[9] The Commission noted that the Bell Operating Companies (BOCs) are offering Centrex-ETS in direct competition with CCSA services, and that according different access charge treatment to the two services would raise serious competitive concerns.[10] Moreover, the Commission concluded that there do not appear to be substantial problems with identifying and measuring off-net traffic switched through a Centrex-ETS.[11]

4. The Commission adopted a Notice of Proposed Rule Making to reexamine the access charge treatment of private networks and private line users of the local exchange at the same meeting.[12] The *Private Network Notice* noted that "[l]ike CCSA and EPSCS, Centrex-ETS apparently provides interstate private networks with identical on- and off-net switching functions and may be directly substituted for CCSA-type service."[13] Under these circumstances, the Commission said, it would be very reluctant to exempt Centrex-ETS access lines from switched access charges, while continuing to subject CCSA and EPSCS-type services to these charges.[14] The Commission said that such a course of action would appear to be inconsistent with the goal of the access charge proceeding "to have all interstate users of exchange access pay the same charge for the same service."[15]

III. PETITION AND PLEADINGS

5. Southwestern Bell requests a waiver of Part 69.5 of the Commission's Rules with respect to interstate traffic switched onto the local exchange via Centrex-ETS service, pending resolution of the issues raised in the *Private Network Notice*. Southwestern Bell says that it has good cause to request the waiver because although its Centrex-ETS switches can distinguish between local and toll usage, these switches are currently unable to identify the jurisdiction of the off-net toll usage on a call-by-call basis.[16] In addition, Southwestern Bell argues that the pendency of the *Private Network Notice* suggests that the application of interstate access charges to Centrex-ETS may be temporary.[17] Southwestern Bell concludes that because the rule with regard to Centrex-ETS may be temporary, the Commission should waive Section 69.5 with respect to interstate traffic switched onto the local exchange via Centrex-ETS.[18]

6. AT&T opposes Southwestern Bell's petition, arguing that Southwestern Bell fails to provide the information necessary to evaluate its waiver request, and therefore fails to show good cause.[19] AT&T states that Southwestern Bell's petition does not specify how many of its switches are capable of interstate and intrastate leakage, and how many lack the capacity to distinguish interstate from intrastate leakage. AT&T also notes that Southwestern Bell fails to discuss why its switches cannot be modified, or why it cannot comply with the rules by some means other than a waiver.[20] Finally, AT&T suggests that it might be appropriate to defer resolution of the waiver request pending development of the record in the *Private Network* Rule Making.[21]

7. Ameritech, GTE, and SNET support Southwestern Bell's petition and request that the waiver extend to the Centrex-ETS services of all LECs.[22] Ameritech contends

that the reference in the *Bell Atlantic Order* to the request for comment on the continued application of interstate access charges to Centrex-ETS in the *Private Network Notice* implies that the application of those charges to Centrex-ETS is temporary.[23] Ameritech contends that modification of its Centrex-ETS switches would be costly and inefficient, and that a waiver is necessary to prevent LECs from incurring costs and creating inefficiencies in order to comply with a rule that may later be modified.[24] GTE also believes that to require carriers to implement system changes to accommodate the rule interpretation for Centrex-ETS services before the *Private Network* Rule Making proceeding is completed would require large expenditures that may be unnecessary.[25] Finally, SNET supports the petition, contending that it would be both impractical and a misallocation of resources to apply interstate access charges to Centrex-ETS at this time, as that application may be temporary.[26] SNET further argues that its ability to detect, identify and measure off-net traffic depends not only upon the type of switch that SNET uses, but upon the customer's network configuration.[27] For these reasons, Ameritech, GTE, and SNET suggest that the *Bell Atlantic Order* requirement be waived for all LECs.

8. US West, however, says that it currently offers Centrex-ETS service to GSA and charges FGA rates for interstate off-network calls. Therefore, US West says, no waiver is required for those Centrex-ETS services offered by US West that are in direct competition with CCSA services. US West reads the *Bell Atlantic Order* to say that interstate access charges do not apply to services that include some ETS functionality offered to private systems, but do not compete directly with CCSA services.[28]

9. In its reply comments, Southwestern Bell contends that all of its switches are currently incapable of determining jurisdiction.[29] Southwestern Bell says that its switches can identify the calling party for Feature Group D (FGD) traffic originating in the local exchange, but the switches are not configured to identify the calling party or the called party for FGA and Feature Group B (FGB) traffic originating in the local exchange or for any traffic terminating in the local exchange.[30] Southwestern Bell reiterates its request that the Commission grant its petition subject to final resolution of the *Private Network* Rule Making.

10. Ameritech, in its reply comments, says that in order to achieve measurement capability, Ameritech would have to reconfigure its network to route calls terminating through Centrex-ETS arrangments into separate trunk groups. Ameritech notes that the Commission has asked for comment in the *Private Network Notice* on the costs of reconfiguration, and has acknowledged the possibility that such reconfiguration may be inadvisable if it is difficult, costly or inefficient. Ameritech argues, therefore, that LECs should be permitted to defer reconfiguration until the Commission has resolved the issues in the *Private Network* Rule Making.[31] In addition, Ameritech disagrees with AT&T's suggestion that the Commission defer resolution of the waiver request pending development of the record in that Rule Making. Ameritech concludes that it would be wasteful to require carriers to incur costs as a result of rules that the Commission may soon decide to eliminate.[32]

11. In its reply comments, AT&T argues that neither Southwestern Bell's petition nor the comments of the other parties provide the basis for granting a waiver. AT&T contends that the fact that a Commission rule may be revisited at some future time cannot by itself justify a waiver.[33] AT&T notes that none of the parties commenting provide information showing the cost of compliance, or the number of Centrex-ETS arrangements that will be subject to the rule.[34] AT&T suggests that the lack of information is critical because the waiver requested would undermine the Commission's fundamental principle of affording equal treatment under the access charge rules to like services.[35]

IV. DISCUSSION

12. The standard for granting a waiver is well established. As the court in *WAIT Radio v. FCC* stated it: "An applicant for waiver faces a high hurdle even at the starting gate. 'When an applicant seeks a waiver of a rule, it must plead with particularity the facts and circumstances which warrant such action'."[36] Furthermore, the same court observed, the "very essence of waiver is the assumed validity of the general rule, and also the applicant's violation unless waiver is granted."[37] Southwestern Bell alleges no particular circumstances that might entitle it to a waiver.[38] Even taking its factual assertions at face value, Southwestern Bell does not demonstrate that it cannot take reasonable steps to comply with the Commission's rule. Moreover, rather than assuming the validity of the Commission's conclusion and seeking a waiver based on its particular circumstances, Southwestern Bell essentially challenges the rule itself.[39] Therefore, we find Southwestern Bell has not satisfied the applicable standards, and we deny its petition.

13. Southwestern Bell makes two basic arguments in support of its petition. First, it asserts that the ruling in the *Bell Atlantic Order* is temporary, because of the pendency of the *Private Network* proceeding, and that it would be burdensome and wasteful for it to take the steps necessary to comply with current access rules since the Commission might soon change them. Second, it contends it is unable to identify the jurisdiction of off-net Centrex-ETS traffic and that, as a result, it should not be required to assess switched access charges on Centrex-ETS traffic. We address these contentions in turn.

14. First, the *Bell Atlantic Order* and the *Private Network Notice* were companion items, adopted by the Commission on the same day. Had the Commission thought it appropriate, it would have reserved the Centrex-ETS question for the *Private Network* proceeding. Instead, the Commission interpreted the existing rules to classify Centrex-ETS as a CCSA-equivalent service on which switched access charges should be assessed. In so doing, the Commission noted that one essential purpose of the access charge proceeding was the elimination of unreasonable discrimination and undue preferences for rates for interstate services.[40] The Commission found that CCSA and Centrex-ETS are directly competitive services and perform many of the same functions,[41] and that according different access charge treatment to the two services would thus raise serious competitive concerns.[42] Thus, we think it clear that the Commission intended that the ruling announced in the *Bell Atlantic Order* apply immediately and be effective unless and until the Commission adopts changes in its rules. We therefore conclude that the pendency of the *Private Network* proceeding is not grounds for a waiver.

15. Second, while Southwestern Bell asserts it cannot measure the traffic to be assessed access charges, it concedes that its Centrex-ETS switches are capable of distinguishing between local and toll traffic.[43] Southwestern Bell simply states, however, that all of its Centrex-ETS switches are "currently incapable of identifying the jurisdictional nature of the calls which they route."[44] Southwestern Bell's contention, that inability to identify jurisidiction obviates the requirement that access charges be assessed, is contrary to Commission precedent. Despite a similar inability on the part of LECs to identify the jurisdiction of certain other common carrier (OCC) Feature Group A and Feature Group B traffic[45] and terminating Feature Group C and Feature Group D traffic,[46] access charges are assessed on that traffic.

16. Where actual measurement and identification of the jurisdiction of traffic routed over Centrex-ETS switches is possible, LECs will be able to assess switched access charges on traffic that is actually off-net and interstate. If identification of jurisdiction is not possible in all cases, reasonable surrogates can be applied to the unmeasurable usage. LECs providing Centrex-ETS service that cannot determine jurisdictional usage may request a waiver in order to apply a reasonable surrogate for actual identification. The Entry/Exit Surrogate (EES), with reporting of percentage interstate use (PIU) by the access customer,[47] is presently used for other Feature Group A users,[48] and may be appropriate here. Absent adequate justification we will expect carriers to apply consistent and nondiscriminatory surrogates to all users of Feature Group A services.[49] The Commission will, of course, consider the issue of application of access charges to Centrex-ETS and the use of surrogates on a permanent basis in its decision in the *Private Line* Rule Making.[50]

17. Finally, we take this opportunity to clarify that the *Bell Atlantic Order* requires that switched access be assessed on *all* Centrex-ETS services. US West has apparently chosen to read the *Bell Atlantic Order* very narrowly, and concludes that the order applies only to services in direct competition with CCSA services, and not to all Centrex services with ETS functionality.[51] While the Commission was concerned about the competitive impacts of different access charge treatment of CCSA and Centrex-ETS, that was not its only concern, and the Commission did not limit the application of switched access charges to a subset of Centrex-ETS services -- *e. g.*, only those "presently competing" with CCSA services. Rather the Commission interpreted its rules to require the assessment of switched access charges on all Centrex-ETS services.

V. ORDERING CLAUSE

18. ACCORDINGLY, IT IS ORDERED, that pursuant to Sections 4(i), 4(j), 5(c), 201-205, 218, 220, 403, and 404 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 155(c), 201-205, 218, 220, 403, and 404 and Section 1.3 of the Commission's Rules, 47 C.F.R. § 1.3, and authority delegated thereunder pursuant to Sections 0.91 and 0.291 of the Commission's Rules, 47 C.F.R. §§ 0.91 and 0.291, the Petition for Waiver of Part 69 of the Commission's Rules of Southwestern Bell Telephone Company IS HEREBY DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] 47 C.F.R. § 69.5.

[2] FCC Public Notice, DA 88-88 (Comment Cycle Established Regarding Southwestern Bell's Petition for Waiver of Part 69.5 of the Commission's Rules), released February 8, 1988. The following parties filed comments: American Telephone & Telegraph (AT&T), Ameritech Operating Companies (Ameritech), GTE, Southern New England Telephone Company (SNET), and Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company and Pacific Northwest Bell Telephone Company (US West). The following parties filed reply comments: AT&T, Ameritech, and Southwestern Bell.

[3] Bell Atlantic Petition for Declaratory Ruling Concerning Application of the Commission's Access Charge Rules to Private Telecommunications Systems, Memorandum Opinion and Order, 2 FCC Rcd 7458 (1987) (hereinafter *Bell Atlantic Order*).

[4] United States v. Western Electric Co, No. 82-0192, slip op. (D.D.C. Nov. 26, 1986), *aff' d*, No. 87-5063, slip op. (D.C.Cir. May 10, 1988).

[5] United States v. American Tel. & Tel. Co., 552 F.Supp. 131 (D.D.C. 1982), *aff' d sub nom.* Maryland v. United States, 460 U.S. 1001 (1983).

[6] In this context, the terms "on-network" or "on-net" call describe a call made from one telephone or terminal to another telephone or terminal on that private network. An "off-network" or "off-net" call describes a call made between a point that is not part of the private network and a point on the private network. Typically, a local exchange or end office switch and a common line are used to originate or terminate off-net calls.

[7] CCSA is a service offered by AT&T, using dedicated transmission lines and switches to create nationwide, private telecommunications networks. The CCSA switches not only connect private lines, but also interconnect those lines and networks with the telephone companies' local exchange, and switch calls that originate or terminate over such local networks on and off CCSA private networks.

[8] Centrex-ETS provides toll-type switching functions -- that is, it can be used to interconnect interexchange trunks and switch between those trunks traffic that neither originates nor terminates in the exchange area where the Centrex-ETS switch is located. Centrex-ETS also provides a LATA-wide point of concentration for traffic to be directed to an interexchange carrier and/or a Centrex-ETS private network. Furthermore, it offers certain private network management features, such as uniform numbering plans, automatic alternate routing (AAR), automatic route selection (ARS), and station message detail recording (SMDR).

[9] *Bell Atlantic Order* at para. 17.

[10] *Id.*

[11] *Id.*

[12] Amendment of Part 69 of the Commission's Rules Relating to Private Networks and Private Line Users of the Local Exchange, Notice of Proposed Rule Making, CC Docket No. 87-530, 2 FCC Rcd 7441 (1987) (hereinafter *Private Network Notice*).

[13] *Id.* at para. 52.

[14] *Id.* at para. 53.

[15] *Id.* at para. 53, quoting MTS and WATS Market Structure, First Reconsideration Order, CC Docket No. 78-72, 97 FCC 2d 682 (1983) at 712, para. 80.

[16] Southwestern Bell Petition at 1-2, n. 3.

[17] In the *Bell Atlantic Order*, the Commission said that, in the course of the *Private Network* Rule Making, it would specifically consider whether switched access charges should continue to apply to Centrex-ETS. *Bell Atlantic Order*, at para. 18, n.29. *See also Private Network Notice*, at paras. 52-53.

[18] Southwestern Bell also says that it noted the potential implementation problems associated with applying access charges to interstate Centrex-ETS calls in its reply comments to the Bell Atlantic petition. Southwestern Bell petition at 2, n.4. In those reply comments, in the context of discussing MCI's contention that interstate access charges should apply to Centrex but not to PBX, Southwestern Bell says that LECs will not necessarily know the jurisdictional nature of traffic routed from an interexchange carrier to the Centrex switch. Southwestern Bell Reply Comments to Bell Atlantic Petition, at 3.

[19] AT&T Comments at 2-3.

[20] *Id.* at 3. AT&T indicates that where its CCSA switches cannot distinguish interstate and intrastate leakage, the LEC assumes all leakage is interstate. *Id.*

[21] *Id.* at 4. AT&T claims that the information needed in the context of this waiver request is the same sought in the *Private Network Notice*.

[22] Ameritech Comments at 4; GTE Comments at 4; SNET Comments at 1.

[23] Ameritech Comments at 3. Ameritech also points to the section of the *Private Network Notice* in which the Commission requested comment on whether certain switches should be excluded from a measurement requirement, and the basis for the exclusion. *Id.*

[24] *Id.* at 4.

[25] GTE Comments at 3.

[26] SNET Comments at 3-4.

[27] *Id.* at 3.

[28] US West Comments at 3-4.

[29] Southwestern Bell Reply Comments at 3. Southwestern Bell says that it uses the following switches in providing Centrex-ETS and Centrex service: 1E/1A ESS, DMS-100, 5ESS, and 2BESS.

[30] *Id.* at 3.

[31] Ameritech Reply Comments at 1-2.

[32] *Id.* at 3.

[33] AT&T Reply Comments at 2-3.

[34] *Id.* at 3.

[35] *Id.* at 4.

[36] WAIT Radio v. FCC, 418 F.2d 1153, 1157 (D.C. Cir. 1969) (quoting Rio Grande Family Radio Fellowship, Inc. v. FCC, 406 F.2d 664 (D.C.Cir. 1968).

[37] *Id.* at 1158.

[38] That Southwestern Bell's circumstances are not unique is underscored by the fact that SNET, GTE, and Ameritech request that the waiver be extended to all LECs offering Centrex-ETS services. SNET Comments at 1; GTE Comments at 4; Ameritech Comments at 2.

[39] Southwestern Bell Petition at 4. Southwestern Bell's request resembles a petition for reconsideration -- although it would not have been timely filed as such.

[40] *Bell Atlantic Order* at para. 5.

[41] *Id.* at para. 16.

[42] *Id.* at para. 17.

[43] Southwestern Bell Petition at 1-2, n.3.

[44] *Id.* at 1-2.

[45] *See* MCI Telecommunications Corporation, Determination of Interstate and Intrastate Usage of Feature Group A and Feature Group B Access Services, FCC 85-145 (released April 16, 1985) (*EES Order*), *recon. denied*, FCC 85-595 (released November 13, 1985).

[46] *See , e. g.*, Southwestern Bell Tariff No. 68, § 2.3.14(a)(4).

[47] *See* EES Order, at para. 25.

[48] The Joint Board in CC Docket No. 85-124 is presently considering permanent rules regarding the use of EES by OCCs.

[49] In assessing the reasonableness of a surrogate, we will presume that similar surrogates should apply to all Feature Group A users. Surrogates that deviate from the norm should be accompanied by an explanatory justification. We note that in its comments to the Southwestern Bell petition, AT&T states that to the extent that its CCSA switches are incapable of distinguishing interstate from intrastate leakage, the LEC assumes all leakage to be jurisdictionally interstate for access charge purposes. AT&T Comments at 3. This approach may be reasonable in light of the nature of the traffic carried over CCSA networks, which is generally assumed to be predominantly interstate. A different approach, however, may be more appropriate for Centrex-ETS traffic, and the LECs should explain the basis for their specific proposals in their filings.

[50] *See supra* note 17.

[51] US West Comments at 3-4.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 88-301

In the Matter of

Revocation of
License of

JHP File No. 13998-CL-CP-133-A-86
PARTNERSHIP

Nonwireline cellular licensee
of Station KNKA483 in the
Manchester-Nashua, N.H. MSA

ORDER TO SHOW CAUSE AND HEARING DESIGNATION ORDER

Adopted June 13, 1988; Released June 15, 1988

By the Chief, Common Carrier Bureau:

1. Pursuant to Section 1.91 of the Commission's Rules, JHP Partnership (JHP), Jalal Hashtroudi, Robert A. Pelissier, and U.S. Cellular Corporation (USCC) are hereby ordered to show cause why an order of revocation of the above-captioned license should not be issued or some other sanction be imposed. The reason for this action is that it appears the parties associated with the captioned partnership have violated Section 22.39 of the Commission's Rules.

BACKGROUND

2. On September 26, 1985, James F. Jenkins, Jalal Hashtroudi, and Robert A. Pelissier entered into a partnership agreement to apply for the nonwireline cellular license in the Manchester-Nashua, N.H. Metropolitan Service Area (MSA). Each partner had equal responsibility for partnership business management. Mr. Jenkins had 50% ownership interest and Messrs. Hashtroudi and Pelissier each had 25% ownership interest. Mr. Jenkins was designated to execute documents on behalf of the partnership.

3. On February 5, 1986, JHP filed its cellular application for the Manchester-Nashua MSA. The certification page was signed by Mr. Jenkins as "Managing Partner," and Mr. Jenkins also certified that he was the authorized representative of JHP. The certification stated that the application was "complete in every respect" and that it contained "all of the information required by FCC Form 401 and the Commission's cellular application rules."

4. On June 3, 1986, JHP filed an amendment pursuant to Section 1.65 of the Commission's Rules and as required by the Public Notice identifying JHP as the tentative selectee for Manchester-Nashua. The amendment was signed by Robert A. Pelissier for JHP, rather than Mr. Jenkins, who had been identified as the managing partner in the original application and who was, pursuant to the partnership agreement and the application certification page, the only partner authorized to sign on behalf of the partnership. Nevertheless, in the June 3, 1986 amendment, Mr. Jenkins was again identified as the "Managing Partner." On October 27, 1986 JHP's application was granted.

5. On May 20, 1987, JHP filed an FCC Form 430. In Exhibit A of that filing, three partners were listed: Robert A. Pelissier at 25% equity ownership, Jalal Hashtroudi at 25% equity ownership, and U.S. Cellular Corporation (USCC) at 50% equity ownership. According to that exhibit each partner has one vote, representing an equal voice in the management of the partnership, "[p]ursuant to Partnership Agreement dated September 26, 1986." In addition, Exhibit A contended that "[t]he partnership agreement has been amended to permit the entry of U.S. Cellular into the partnership." Because each partner has one vote, JHP claims that there has been no *de facto* or *de jure* change in control of JHP. JHP did not provide a copy of the amended partnership agreement with the Form 430.

6. The Mobile Services Division staff questioned JHP concerning its Form 430, and further information was supplied by JHP through its counsel. JHP states that Mr. Jenkins agreed to assign his partnership interest to USCC without consultation or approval of Pelissier or Hashtroudi, and that they were not notified of Jenkins' action until December of 1986. JHP argues that under California law, Jenkins could only assign his beneficial interest (*i. e.*, his share of any profits) to USCC. JHP further argues that the agreement between USCC and Jenkins did not admit USCC to the partnership and that USCC did not "have any vote or influence, direct or indirect, in the affairs of the JHP Partnership by virtue of the assignment of interest." JHP advises that subsequent to Jenkins' assignment of his interest to USCC, JHP negotiated the entrance of USCC into the partnership. A Restated Partnership Agreement was adopted.

The Restated Partnership Agreement

7. The new partnership agreement was supplied to the Commission on August 7, 1987 after it was requested by Mobile Services Division staff. The "Restated Partnership Agreement" provides that Pelissier and Hashtroudi shall each contribute 25% of the capital needed for the partnership, but that "USCC shall either loan them the amount of the capital contribution, or assist them in obtaining a loan in that amount." Moreover, any "such loan by USCC shall be secured by a pledge of the borrower's interest in the Partnership" with an interest rate equal to 1.5% above the "TDS Rate," which is the weighted average of the interest rates payable on notes of Telephone and Data Systems, Inc.

8. The restated agreement also provides that Hashtroudi and Pelissier may require USCC to purchase their partnership interests, and after February 11, 1994, USCC may require Hashtroudi and Pelissier to sell their partnership interests to it. USCC is currently paying 775,000 in installments to both Pelissier and Hashtroudi. The agreement specifies that "[i]n the case of a sale of the interest of Pelissier or Hashtroudi in the Partnership pursuant to [the agreement], the amount to be paid by USCC upon purchase . . . shall be reduced by all amounts previously paid to the selling Partner . . . ."

DISCUSSION

9. We are not persuaded that California partnership law supports JHP's interpretation of control in the circumstances of this proceeding. The California Uniform Partnership Act[1] (hereinafter "the Partnership Act) governed the first partnership agreement among the original partners (Jenkins, Hashtroudi and Pelissier). Pursuant to the Partnership Act, "a conveyance by a partner of his interest in the Partnership does not of itself dissolve the Partnership. . ."(Section 15027), and "[a] continuation of the business by the partners or such of them as habitually acted there- in. . . without any settlement or liquidation of the Partnership affairs, is *prima facie* evidence of a continuation of the Partnership. "(Section 15023).

10. On the other hand, "dissolution of a Partnership is the change in the relation of the partners *caused by any partner ceasing to be associated in the carrying on* as distinguished from the winding up *of the business*. " (Emphasis supplied, Section 15029). The Partnership Act also provides that dissolution of a partnership is caused "[b]y withdrawal of a partner . . . unless otherwise provided in an agreement in writing signed by all of the partners, including any such withdrawing partner . . . *before such withdrawal* . . . ." (Emphasis supplied, Section 15031(7)). Moreover, "[e]xcept so far as may be necessary to wind up partnership affairs or to complete transactions . . . dissolution terminates all authority of any partner to act for the Partnership, . . . with respect to the partners, [and] . . . [w]ith respect to persons not partners . . . ." (Section 15033).

11. The fact that Mr. Jenkins was a partner who "habitually acted" in the partnership business is established by his 50% interest in the partnership, the fact that he signed the cellular application on behalf of the partnership, as well as his designation as sole representative of the partnership, and his status as "Managing Partner." It is equally apparent that Mr. Jenkins "ceased to be associated in the carrying on of the business," as evidenced by his failure to sign on behalf of the partnership from June 1986 onward, by his apparently unilateral withdrawal from the partnership, and by his sale of his partnership interest in November-December 1986.

12. Based on the documentation supplied by JHP, there appear to be factual inconsistencies which require resolution in an evidentiary proceeding. In particular, we are not persuaded by JHP's interpretation regarding control by the partnership under California partnership law. The Partnership Act seems to indicate that in the absence of a written agreement signed by all three original partners, the cellular applicant, JHP Partnership, no longer existed as of the date Jenkins sold his interest to USCC (at the latest). Accordingly, it appears that 100 percent ownership of the cellular license was transferred at that time to a second, *de facto*, partnership of Hashtroudi and Pelissier.[2] In March 1987, it appears that the *de facto* partnership then transferred 50 percent ownership of the cellular license to USCC. The *de facto* partnership also appears to have transferred full control of the cellular license to USCC in March 1987. [3]

13. Section 22.39 of the Commission's Rules requires that licensees request authorization prior to transfering ownership or control. Section 22.39(a)(1) states that a "change from less than 50% ownership to 50% or more ownership shall always be considered a transfer of control." Permittees and licensees are therefore required to file a Form 490 prior to such transfer. JHP Partnership did not seek the Commission's approval prior to transfering its license to the *de facto* partnership of Hashtroudi and Pelissier. In addition, Hashtroudi and Pelissier did not seek the Commission's approval prior to accepting USCC as a 50% partner.

ORDERING CLAUSES

14. WHEREFORE, the foregoing premises considered, IT IS HEREBY ORDERED that USCC, Robert A. Pelissier, Jalal Hashtroudi, and James F. Jenkins SHOW CAUSE why the license granted to JHP Partnership in Block A for the Manchester-Nashua, N.H., MSA should not be revoked, or in the alternative, why other sanctions should not be invoked.[4]

15. Accordingly, IT IS ORDERED, that the captioned license IS DESIGNATED FOR HEARING pursuant to Section 312 of the Communications Act, as amended, upon the following issues:

1. To determine the facts and circumstances surrounding the sale of Jenkins' partnership interest to USCC;

2. To determine the facts and circumstances of the "restated partnership agreement" and the relationship between USCC and the other JHP partners;

3. Whether, in view of the evidence adduced under the foregoing issues, the non-wireline cellular license for the Manchester-Nashua, N.H. MSA has been the subject of one or more unauthorized transfers of control in violation of Section 22.39 of the Commission's Rules;

4. Whether, in view of the evidence adduced on the foregoing issues, the non-wireline cellular license for the Manchester-Nashua, N.H. MSA should be revoked or some other sanction be imposed.

16. IT IS FURTHER ORDERED that USCC, Robert A. Pelissier and Jalal Hashtroudi APPEAR BEFORE THE COMMISSION at a hearing before an Administrative Law Judge, the time and place of which shall be announced by the Judge in a later order, TO GIVE EVIDENCE upon the foregoing issues.

17. IT IS FURTHER ORDERED that the burden of proceeding and the burden of proof shall be upon the Commission, as required by Section 312 of the Communications Act, as amended.

18. IT IS FURTHER ORDERED that the Chief, Common Carrier Bureau is made a party to this proceeding.

19. IT IS FURTHER ORDERED, that the specified parties may avail themselves of an opportunity to be heard by filing with the Commission a Notice of Appearance within 20 days of the mailing of this Notice.

20. This order is issued under Section 0.291 of the Commission's Rules and is effective on its release date. Applications for review will be entertained under Section 1.115(e)(3) of the Rules. *See* Section 1.4(b)(2). Petitions for reconsideration of designation orders may not be filed except insofar as they relate to an adverse ruling as to participation of a party in the hearing, under Section 1.106(a)(1).

21. The Secretary shall cause a summary of this Order to be published in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] California Corporate Code Section 15007 ff.

[2] Based on the evidence supplied by JHP to date and the Partnership Act, it can be concluded that when JHP Partnership was dissolved, no legally operative partnership took its place. It appears that Hashtroudi and Pelissier were not a legally operative partnership because their only apparent activity as cellular licensees was to enter into an agreement with USCC that requires the immediate payment of installment payments on the purchase price of their partnership interests. Under the Partnership Act, receipt of profits is *prima facie* evidence of the existence of a partnership, but not if payments received are consideration for the sale of property by installments or otherwise. Section 15007 (1)(e), California Uniform Partnership Act. Payments required by the terms of the Revised Partnership Agreement appear to fit into this category.

[3] We note that USCC has only one-third voting share in the new partnership. However, it has disproportionate financial power over Hashtroudi and Pelissier under the Restated Partnership Agreement. As noted above, USCC will loan to Hashtroudi and Pelissier their capital contributions, or act as guarantor for other arrangements which they may make. Hashtroudi and Pelissier are already receiving payment on the sale price of their interests - the same price that USCC paid to Mr. Jenkins. Virtually the only decision left to Hashtroudi and Pelissier is when, not whether, to openly transfer their interests to USCC. We note that the partnership agreement does not mention, let alone allocate, responsibility for day-to-day cellular operations or other plans for placing cellular service before the public. The Restated Partnership Agreement appears on its face to be a transparent sales agreement, doubly unauthorized, as it were, because it was not submitted in advance for Commission approval, and it also appears to transfer full *de facto* control over the cellular license to USCC.

[4] Because the alleged actions which are the subject of this proceeding are willful as defined in Section 312(f) of the Communications Act, the notice requirement of Section 558 of the Administrative Procedure Act does not apply. *See* 5 U.S.C. Section 558(c).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Applications of

LAWRENCE N. BRANDT File No. 1718-CM-P-83

and

KRISAR, INC. File No. 6619-CM-P-83

For Authority to Construct and
Operate Multichannel Multipoint
Distribution Service stations
to serve the Cleveland, Ohio area

MEMORANDUM OPINION AND ORDER

Adopted: June 22, 1988; Released: June 24, 1988

By the Chief, Domestic Facilities Division:

I. INTRODUCTION

1. North Coast Cable Television, Ltd. (hereinafter referred to as North Coast) filed separate Petitions to Deny opposing the colocation of the above-referenced Multichannel Multipoint Distribution Service (MMDS) stations. North Coast holds a franchise to construct a cable television system in Cleveland, Ohio. Oppositions to the Petitions to Deny were filed by Lawrence N. Brandt (hereinafter referred to as Brandt) and Krisar, Inc. (hereinafter referred to as Krisar). North Coast filed separate Replies.

II. BACKGROUND

2. After Brandt's application for the E-group channels and Krisar's application for the F-group channels were tentatively selected for qualification review as the result of Commission lotteries, North Coast filed separate Petitions to Deny against each of the above-referenced applications, alleging, on various grounds, that neither Brandt nor Krisar were qualified to be MMDS licensees. In *Krisar, Inc.*, 1 FCC Rcd 1007 (Common Carrier Bur. 1986), and in *Lawerence N. Brandt*, Mimeo No. 6379 (Common Carrier Bur. Aug. 18, 1986)(available on LEXIS, FedCom lib., FCC file), North Coast's Petitions were denied.

3. Subsequently, Brandt and Krisar filed Applications, FCC Forms 435, proposing to co-locate[1] the two proposed adjacent channel MMDS stations for the Cleveland area so as to resolve the potential for harmful adjacent channel interference.

4. North Coast filed separate Petitions to Deny against the change-of-transmitter-location applications for the two proposed MMDS stations, alleging that Krisar and Brandt failed to demonstrate that the proposed co-location of their stations will not create new or increased interference with each other.[2] In its Opposition, Krisar argued, *inter alia*, that North Coast lacked standing because a claim of competitive injury is not recognizable as a basis for standing in view of the Commission's sanctioning of cable-MMDS competition. Krisar also argued that North Coast's allegations were generalized and attenuated. In his Opposition, Brandt argued, *inter alia*, that North Coast, as a programmer, lacked standing because it would not compete with Brandt (who will lease transmission capacity to a customer-programmer) for subscribers, but instead would compete with Brandt's customer-programmer for subscribers; and that any potential competitive injury to North Coast would not be redressed by a decision by us denying Brandt's change-of-transmitter-location application. In its Reply, North Coast argued that its interest in insuring that Brandt and Krisar comply with statutory and regulatory requirements is a valid basis for standing. It also asserted that direct competition exists with the MMDS programmer "through the proposed [MMDS] facility." North Coast argued that the change-of-transmitter-location applications are "an integral part of bringing the [MMDS] plan to fruition." Finally, North Coast asserted that it was found to have standing to challenge an Instructional Television Fixed Service (ITFS) licensee in Cleveland, and therefore, has standing here.

III. DISCUSSION

5. *Standing Requirements*. Section 309(d)(1) of the Communications Act of 1934, as amended, 47 U.S.C. § 309(d)(1), and Section 21.30 of the Commission's Rules, 47 C.F.R. § 21.30, require that a person filing a petition to deny demonstrate it is a party-in-interest.[3] A petition to deny must contain specific factual allegations sufficient to demonstrate that the petitioner is a party-in-interest, supported by an affidavit of a person with personal knowledge of the facts recited.[4]

6. Pursuant to the standard enunciated in *Sierra Club v. Morton*, 405 U.S. 727, 733 (1972), that a party seeking standing must have suffered a direct injury, the Commission determined in *National Broadcasting Co.*, 37 FCC 2d 897, 898 (1972), that party-in-interest status is imparted when the petitioner to deny demonstrates that a grant of the subject application will cause the petitioner to suffer a direct injury. *See Martin - Trigona v. FCC*, 432 F.2d 682 (D.C.Cir. 1970).

7. A petition to deny must demonstrate not only a direct or threatened "distinct and palpable injury" to the petitioner,[5] but also a causal link "between the claimed injury and the challenged action." *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 72 & 78 (1978)(hereinafter cited as *Duke)* ; *see also Petition for Rule Making to Establish Standards for Determining the Standing of a Party to Petition to Deny a Broadcast Application*, 82 FCC 2d 89, 96 (1980). The causal link must be demonstrated by establishing: (1) "that these injuries fairly can be traced to the challenged action," *Duke*, 438 U.S. at 74; *see also Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38 & 41 (1976)(hereinafter cited as *Simon)* ; and (2) that "the injury would be prevented or redressed by the relief requested." *Duke*, 438 U.S. at 81; *Simon*, 426 U.S. at 39.[6]

8. Thus, to establish standing for purposes of a petition to deny, North Coast must demonstrate this causal link, by (1) showing an injury to itself that is "fairly traceable"[7] to a decision to grant the two change-of-transmitter-location applications; and (2) the injury is likely to be prevented or

redressed by a decision by us denying the two change-of-transmitter-location applications. *Duke*, 438 U.S. at 74; *Simon*, 426 U.S. at 38-39; *see SCRAP*, 412 U.S. at 687-88.[8]

9. *Application of Standing Requirements*. Krisar and Brandt have filed applications to change the location of their transmitters for purposes of colocation. Although North Coast implies that it will suffer economic injury due to competition for subscribers, it provides no evidence as to how a change in the location of these transmitters will decrease the number of subscribers for North Coast.[9] *See Allen v. Wright*, 468 U.S. at 766.

10. This claim to standing fails with regard to both components of the "causal link" test. North Coast describes no connection between the injury it alleged, economic competition, and a decision by us to grant the subject change-of-transmitter-location applications. *See SCRAP*, 412 U.S. at 688-89. These petitions to deny fail to demonstrate that grant of the change-of-transmitter-location applications would result in North Coast experiencing additional economic competition from these two MMDS stations. Accordingly, the alleged injury is not "fairly traceable" to the grant of the change-of-transmitter-location applications. *See Allen v. Wright*, 468 U.S. at 751 & 753.

11. With regard to the "redressability" component of the "causal link" test, North Coast failed to show "an injury to itself that is 'likely to be redressed by a favorable decision'", *i. e.*, by a denial of the change-of-transmitter-location applications. *Simon*, 426 U.S. at 38; *see Duke*, 438 U.S. at 75, n. 20. The alleged injury, economic competition, would occur whether the MMDS stations transmitted from their first proposed transmitter locations or from the second proposed transmitter location. The lack of a causal link is illustrated by consideration of the effect on North Coast if these two applications for change-of-transmitter-locations are denied. If denied, construction and operation could occur at the sites first proposed by Krisar and Brandt, with the same effect upon North Coast. North Coast did not allege that it would escape economic competition if we required Krisar and/or Brandt to operate from the first sites proposed.[10]

12. North Coast failed to carry its burden of showing a "causal link" between its threatened injury, economic competition, and a decision by us to grant the two change-of-transmitter-location applications, as required by Section 309(d)(1) of the Communications Act and Section 21.30 of the Commission's Rules. *See Simon*, 426 U.S. at 28 & 45; *Duke*, 438 U.S. 72.[11] Without demonstrating this "causal link," a claim of standing fails. Consequently, we conclude that North Coast is not a party-in-interest and does not have standing to oppose these colocation applications.[12]

IV. CONCLUSION

13. Accordingly, IT IS ORDERED that the petitions to deny filed by North Coast Cable Television, Ltd. concerning the change-of-transmitter-location applications for the above-referenced MMDS stations ARE HEREBY DISMISSED.

14. This order is issued pursuant to Sections 0.91 and 0.291 of the Commission's Rules, 47 C.F.R. §§ 0.91 and 0.291, and is effective on its release date. Petitions for reconsideration pursuant to Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, or applications for review pursuant to Section 1.115 of the Commission's Rules, 47 C.F.R. § 1.115, may be filed within thirty (30) days of the date of public notice of this order. *See* Section 1.4(b) of the Commission's Rules, 47 C.F.R. § 1.4(b).

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] The application amendments specified an increase in antenna height, change of the transmitter locations, changes in polarization and emission designations, and transmitter replacements, all necessary for the purpose of co-location.

[2] In addition, North Coast challenges the separate agreements of Brandt and Krisar with Metropolitan Cablevision, Inc. for the programming of the two MMDS stations, alleging that the agreements violate Section 21.901(d)(2) of the Commission's Rules, 47 C.F.R. § 21.901(d)(2), the one-to-a-market rule, and that the agreements violate Section 21.29 of the Commission's Rules, 47 C.F.R. § 21.29, the rule on application ownership changes. We will consider in a separate decision these two agreements.

[3] Thus, neither Congress by statute nor the Commission by rule allows "citizen standing," whereby anyone can file a Petition to Deny against a Commission application for any type of proposal or action anywhere in the country. *See* Allen v. Wright, 468 U.S. 737, 754 (1984); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 223, n. 13 (1974).

[4] The affidavits submitted with the Petitions to Deny were limited to a critique of Brandt's and Krisar's interference analyses. No other factual allegations were contained in the affidavits, including no allegations that Brandt's or Krisar's proposed MMDS stations would cause harmful electrical interference with any radio facility of North Coast. Therefore, no affidavits were submitted to support North Coast's standing claims.

[5] The injury must be personal. Allen v. Wright, 468 U.S. 737, 751 (1984); Warth v. Seldin, 422 U.S. 490, 499 (1975)(cannot base claims to standing on the legal rights and interests of third parties); U.S. v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669, 687 & n. 14 (1974) (hereinafter cited as SCRAP)(. . . the importance of demonstrating that the party seeking review be himself among the injured, for it is this requirement that gives a litigant a direct stake in the controversy . . . .); O'Shea v. Littleton, 414 U.S. 488 (1974); *see also* Singleton v. Wulff, 428 U.S. 106, 113-14 (1976). It is significant here that North Coast has not alleged that it has or will have any radio facilities for which there is a potential for harmful electrical interference which would be affected by the change of location of the two MMDS stations.

[6] The Supreme Court in denying standing to parents of black children attending desegregating public schools explained:

> The "fairly traceable" and "redressability" components of the . . . standing inquiry were initially articulated by this Court as "two facets of a single causation requirement." C. Wright, Law of Federal Courts § 13, p. 68, n. 43 (4th ed. 1983). To the extent there is a difference, it is that the former examines the causal connection between the assertedly unlawful conduct and the alleged injury, whereas the

> latter examines the causal connection between the alleged injury and the . . . relief requested. Cases such as this, in which the relief requested goes well beyond the violation of law alleged, illustrate why it is important to keep the inquiries separate if the "redressability" component is to focus on the requested relief. Even if the relief respondents request might have a substantial effect on the desegregation of public schools, whatever deficiencies exist in the opportunities for desegregated education for respondents' children might not be traceable to IRS violations of law -- grant of tax exemptions to racially discriminatory schools in respondent's communities. Allen v. Wright, 468 U.S. at 753, n. 19.

[7] In addition to using the terms "fairly traceable", this element has been variously described by the Supreme Court with the terms "resulting from," Simon, 426 U.S. at 42, and with the terms "the consequence of," *id.* at 45, and with the terms "be traceable to," Allen v. Wright, 468 U.S. at 753, n. 19.

[8] The Supreme Court in SCRAP, 412 U.S. at 687, considered the scope of the challenged agency action, approval of a railroad rate increase; here, the scope of the agency action would be approval of a change in the transmitter location.

[9] North Coast's allegations concerning injury are very different from the injury allegations presented in Office of Communications of United Church of Christ v. FCC, 359 F.2d 994 (D.C.Cir. 1966), in which standing for a license renewal application was recognized for members of "the listening public." North Coast here does not allege that it will be a subscriber to these two MMDS stations. *See* Allen v. Wright, 468 U.S. 737, 746 (1984).

[10] A crucial element in a Supreme Court decision to deny standing was the Court's determination that " . . . it does not follow from the allegation and its corollary that the denial of access to hospital services in fact results from petitioners' new Ruling, or that a court-ordered return by petitioners to their previous policy would result in these respondents' receiving the hospital services they desire," Simon, 426 U.S. at 43; and the Court's determination that "[i]n the instant case respondents' injuries might have occurred even in the absence of the IRS Ruling that they challenge." Simon, 426 U.S. at 46, n. 25.

[11] The chain of causation has been broken here as it was in Simon, 426 U.S. at 26. "The links in the chain of causation between the challenged Government conduct and the asserted injury are far too weak for the chain as a whole to sustain respondents' standing." Allen v. Wright, 468 U.S. at 759.

[12] Standing is determined on a case-by-case basis. We do not reach here the question of standing for North Coast to challenge another type of application filed by Krisar and Brandt. We note that we considered each of the issues raised by North Coast in its Petitions to Deny concerning licensee qualifications initially filed against Krisar and Brandt for the above-referenced MMDS stations. We disagree with North Coast's assertion that if it had standing to file a petition to deny against an Instructional Television Fixed Service licensee, then it has standing to file a petition to deny against an MMDS applicant. North Coast must demonstrate compliance with the requirements of Section 309(d)(1) for each petition to deny it files. Therefore, it must demonstrate that it is a party-in-interest in each petition to deny. Its demonstration in one petition to deny is insufficient for a second petition to deny.

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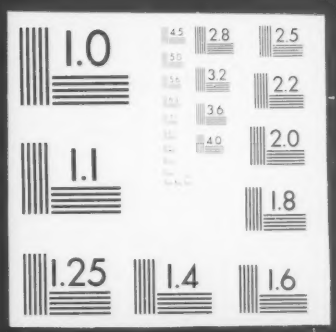
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